(18,574.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 63.

THE ANGLO-AMERICAN PROVISION COMPANY, APPELLANT,

vs.

DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Exhibit A—Complaint in State court	8	5
B—Demurrer in State court	10	6
C—Opinion in State court	11	7
Demurrer	14	9
Opinion on demurrer	18	11
Answer of Smith M. Weed *et al.*	22	13
Davis Provision Co.	31	18
Frank E. Smith *et al.*	37	22
Replication	41	24
Stipulation as to facts and evidence	42	25

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 18, 1903.

	Original.	Print
Transcript of proceedings in circuit court of Cook county, Illinois.	42	25
Præcipe for summons	43	25
Declaration	44	26
Copy of account sued on	47	28
Affidavit of amount due	48	28
Statement	49	29
Plea	50	29
Copy of account pleaded in set-off	53	31
Order setting aside dismissal	56	33
Judgment	56	33
Clerk's certificate	57	34
Defendants' Exhibit A—Assignment from Davis Provision Co. to Weed, &c	59	53
Evidence for complainant	71	43
Testimony of Anderson Fowler	71	43
Evidence for defendants	79	48
Testimony of Henry Davis	79	48
Testimony of John M. Wever	86	53
Exhibit A—Notes	93	58
B—Notice	94	58
Testimony of Smith M. Weed	97	60
Thomas F. Conway	107	67
Robert Stobo	112	70
Offers of exhibits and objections	117	73
Defendants' Exhibit B—Record in supreme court of New York	120	75
Summons	120	75
Complaint	121	76
Amended answer	130	82
Bill of items	135	85
Schedules A and B	137	86
Schedule C	138	87
Schedule D	139	87
Schedules E and F	141	88
Schedules G and H	142	89
Schedule I	143	90
Order of reference	144	91
Report of referee	145	91
Judgment	165	104
Defendants' Exhibit No. 5, March 21, 1901—Charter of the Davis Provision Co	166	105
1—License from secretary of State of Illinois	168	106
2—Certificate of secretary of State of Illinois	169	107
3—Statement of incorporators	171	107
4—Certificate of subscription	172	108
5—Notice of stockholders' meeting	174	109
No. 1, March 21, 1901—By-laws	176	111
No. 2, March 21, 1901—Stockholders' meeting	181	114
No. 3, March 21, 1901—Directors' meeting	182	114
No. 4, March 21, 1901—Directors' meeting	183	116

	Original.	Print
Complainant's Exhibit No. 1—Record from circuit court of the United States for the northern district of Illinois	191	120
Bill of complaint	191	121
Affidavit of Henry Davis	196	122
Report of receiver	199	126
Clerk's certificate	204	128
Opinion of Coxe, J	205	129
Decree	213	133
Petition for appeal	214	133
Allowance of appeal	215	134
Assignment of errors	216	134
Bond on appeal	222	138
Citation (copy)	226	143
Clerk's certificate	228	143

1 Circuit Court of the United States for the Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburg, Henry Davis, as Administrator of the Goods, Chattels, and Credits which were of Julius Davis, Deceased, and American Surety Company, Defendants.

In Equity. Bill of Complaint.

To the honorable judges of the circuit court of the United States in and for the southern district of New York:

Anglo-American Provision Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and having its principal place of business in the city of Chicago, State of Illinois, brings this its bill of complaint against Davis Provision Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, Smith M. Weed, Thomas F.
2 Conway, George S. Weed and Henry Davis, as administrator, of the goods, chattels and credits which were of Julius Davis, deceased, all residents of the city of Plattsburg, State of New York, and citizens and inhabitants within the northern district of this court for the State of New York; Merchants' National Bank of Plattsburg, a national banking corporation organized and existing under and by virtue of the laws of the United States, and having its place of business in Plattsburg, in the State of New York; American Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the city of New York, in the said State of New York; Frank E. Smith, a resident of the city, county and State of New York, and a citizen and inhabitant of the southern district of this court for the State of New York.

And thereupon your orator complains and says that on or about the fourth day of November, 1893, complainant duly commenced an action in the circuit court of Cook county, in the State of Illinois, which said court is a court of general jurisdiction, duly created by the laws of said State, against the defendant, Davis Provision Company, by process of summons duly issued in said action; that defendant, the said Davis Provision Company, duly appeared in said action by its attorneys, and that such proceedings were thereupon duly had in said action that on or about the sixth day of January, 1899, the plaintiff recovered a judgment, which was duly given by said court, against the defendant for the sum of $5,049.98, no part of which has been paid.

And your orator further shows unto your honors that by the laws

of said State the interest upon a judgment runs at the rate of five per cent. per annum.

And your orator further shows unto your honors that on or about the 12th day of June, 1894, an action was commenced in the supreme court in Clinton county, in the State of New York, by the
3 defendant, The Davis Provision Company, against the complainant, The Anglo-American Provision Company and Fowler Brothers (Limited), a corporation organized and existing under the laws of Great Britain and Ireland; that subsequent thereto, and on or about the 13th day of December, 1895, a judgment was entered in the said supreme court in Clinton county in favor of the said Davis Provision Company against the said Fowler Brothers (Limited) and said Anglo-American Provision Company for the sum of $9,241.82; that the judgment was sustained against the said Anglo-American Provision Company and Fowler Brothers (Limited), jointly, on the ground that, and for the reason that the said corporations were found by the referee before whom the said action was tried to be identical in fact and interest as regards any business relations with the said Davis Provision Company.

And your orator further shows unto your honors that, subsequent to the entry of said judgment, an appeal was taken on the part of said defendants, The Anglo-American Provision Company and Fowler Brothers (Limited), to the appellate division of the said supreme court, at which court the said judgment was modified by reducing the amounts found by the said referee, and entered as the judgment of the supreme court, by striking therefrom the sum of $1,574.96, together with an additional sum of 5 per cent. on the said amount of $1,574.96.

And your orator further shows unto your honors that thereafter, and on or about the 30th day of October, 1897, the defendants in said action of the Davis Provision Company against Fowler Brothers (Limited) and Anglo-American Provision Company appealed to the court of appeals of New York State, the same being the highest appellate court of said State, from the decision theretofore entered in the supreme court of said State as modified by the decision of the appellate division; that said appeal came on to be argued, and the judgment, as modified by the appellate division, was in all respects affirmed, and final judgment therein entered in the sum of $9,678\frac{64}{100}$ on the 16th day of July, 1900.

4 And your orator further shows unto your honors that pending the appeal heretofore mentioned in said case of Davis Provision Company against Fowler Brothers (Limited) and Anglo-American Provision Company, the defendants furnished, as security on appeal, the bond of the defendant, The American Surety Company.

And your orator further shows unto your honors that subsequent thereto, and on or about the 21st day of November, 1899, the complainant herein brought an action in the supreme court of New York State, which court is a court of general jurisdiction duly created by the laws of said State, against the defendant, Davis Pro-

vision Company, by process of summons duly issued in said action; that a copy of complainant's bill of complaint in said action is annexed hereto, marked "Exhibit A," and made a part of this bill of complaint; that the defendant in said action, The Davis Provision Company, duly appeared in said action by its attorneys, and demurred to said bill of complaint; that a copy of said demurrer is hereto annexed, marked "Exhibit B," and made a part of this bill; that thereupon and thereafter such proceedings were had that a judgment of said supreme court was duly entered on or about the 21st day of February, 1900, dismissing the said bill of complaint of the complainant herein and sustaining the demurrer of the defendant, The Davis Provision Company; that thereafter on the 23d day of February, 1900, the plaintiff duly appealed from said judgment of the supreme court to the appellate division of said court, which said court is a court of appellate jurisdiction duly created by the laws of said State with authority to hear and determine questions on appeal in such cases; that thereafter, and on or about the 12th day of April, 1900, the said appellate division unanimously affirmed the judgment of the court below, dismissing the complainant's bill of complaint and sustaining the demurrer of the defendant, The Davis Provision Company; and judgment of affirmance was duly entered on the fourth day of May, 1900; that a copy of the opinion of said court handed down on such decision is hereto annexed, marked "Exhibit C," and made a part of this bill.

And your orator further shows unto your honors that the said judgment obtained in the State of Illinois by the plaintiff herein against the Davis Provision Company arose out of the same transactions as the judgment obtained in the State of New York by the said Davis Provision Company against the plaintiff herein and Fowler Brothers (Limited); that by reason of the afore-mentioned decisions of the supreme court and the appellate division of the supreme court of New York State, it is impossible for, and plaintiff is unable to obtain a set-off of the amount of the judgment obtained by it in the State of Illinois against the amount of the judgment obtained against it in the State of New York by the said Davis Provision Company; that the statute of New York State, known as section 1780 of the Code of Civil Procedure, in so far as it purports and is held to prevent the enforcing and efficacy of the judgment obtained by this plaintiff against the Davis Provision Company in the State of Illinois, in New York State is unconstitutional and void.

And your orator further shows unto your honors that the defendant, The Davis Provision Company, is totally insolvent and unable to pay its debts; that its only asset at present is the said judgment against the plaintiff herein in the State of New York.

And your orator further shows unto your honors that the defendants, Smith M. Weed, Merchants' National Bank of Plattsburg, Frank E. Smith, Thomas F. Conway, George S. Weed and Henry Davis, as administrator of the goods, chattels and credits which were

of Julius Davis, deceased, claim to have a lien or interest, by assignment or otherwise, in and to the judgment obtained by said Davis Provision Company against the plaintiff herein in New York State.

6 And your orator further shows to your honors that if any such lien or assignment is held by the said defendants, The Davis Provision Company, Smith M. Weed, Merchants' National Bank of Plattsburg, Frank E. Smith, Thomas F. Conway, George S. Weed and Henry Davis, as administrator of the goods, chattels and credits which were of Julius Davis, deceased, it was obtained without consideration and with full knowledge of plaintiff's rights in the premises, and is invalid and void as against this plaintiff.

And your orator further shows unto your honors that the defendants herein are about to issue execution on the judgment obtained in New York State against the complainant herein and compel a settlement thereof by complainant or by the defendant, The American Surety Company, out of the funds of plaintiff in its hands and without allowing any set-off of said Illinois judgment, although such set-off has been duly demanded.

And your orator further shows unto your honors that complainant herein has no adequate remedy at law.

Wherefore, complainant prays that it be decreed that the amount of the judgment obtained in the State of Illinois by said complainant against the said defendant, The Davis Provision Company, be set off against and deducted from the amount of the judgment obtained in the State of New York by the said Davis Provision Company against the complainant herein and Fowler Brothers (Limited); that the defendant, The Davis Provision Company and its assigns, be forever enjoined from enforcing the judgment obtained in New York State by the said Davis Provision Company, except for the excess of the amount of said New York judgment over and above the amount of the said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action; also that the defendant, The American Surety Company, be forever enjoined from paying over to the other defendants herein any sum or sums except the excess of said New York State judgment over said Illinois

7 judgment, less a reasonable amount to cover the costs of complainant in this its present action; besides such other and further relief as may be necessary, and in addition thereto the costs of this action.

ANGLO-AMERICAN PROVISION CO.,
By ANDERSON FOWLER, *President.*

SOUTHERN DISTRICT OF NEW YORK, }
City, County, and State of New York, } ss:

Anderson Fowler, being duly sworn, deposes and says: I am the president of The Anglo-American Provision Company, the complainant in this action. I have read the foregoing bill of complaint, and know its contents. The same is true to my own knowledge, except

as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

ANDERSON FOWLER.

Sworn to before me this 24th day of July, 1900.

A. M. McKNIGHT,
Notary Public, Queens County.

Certificate filed in N. Y. Co.

8 EXHIBIT "A."

New York Supreme Court, County of New York.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY, Defendant.

The plaintiff above named, by Weiser & Bridges, its attorneys, complains of the above-named defendant, and alleges as follows:

First. That both plaintiff and defendant are foreign corporations, organized and existing under the laws of the State of Illinois.

Second. That on or about the fourth day of November, 1893, plaintiff duly commenced an action in the circuit court of Cook county, in the State of Illinois, which said court is a court of general jurisdiction, duly created by the laws of said State, against the defendant, by process of summons duly issued in said action; that defendant duly appeared in said action by its attorneys, and that such proceedings were thereupon duly had in said action that on or about the sixth day of January, 1899, the plaintiff recovered a judgment, which was duly given by said court, against the defendant for the sum of $5,049.98, no part of *of* which has been paid.

Third. That by the laws of said State the interest upon the judgment runs at the rate of five per centum per annum.

9 Wherefore, plaintiff demands judgment against the defendant for the sum of $5,049.98, with interest thereon from the sixth day of January, 1899, together with the costs of this action.

WEISER & BRIDGES,
Attorneys for Plaintiff.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Wilson Bridges, being duly sworn, deposes and says: I am a member of the firm of Weiser & Bridges, attorneys for The Anglo-American Provision Company, plaintiff in this action. I have read the foregoing complaint and know its contents. The same is true to my knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The sources of my knowledge, and the grounds for my belief are a certified copy of the record of proceedings had in the circuit court of Cook county, State of Illinois, in the action entitled "Anglo-American Provision Company *vs.* Davis Provision Com-

pany," and correspondence and interviews had with the agent of said Anglo-American Provision Company. The reason why the complaint is not verified by the plaintiff, is that the said plaintiff is a foreign corporation of which no officer is at present in the city or State of New York, in which city and State I reside and have my office.

HENRY WILSON BRIDGES.

Sworn to before me this 20th day of November, 1899.

K. BERRALL,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

10 EXHIBIT "B."

Supreme Court, New York County.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY, Defendant.

The defendant demurs to the complaint herein and for the grounds of its demurrer states that it appears upon the face of the complaint:

First. That the court has not jurisdiction of the person of defendant.

Second. That the court has not jurisdiction of the subject of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Fourth. That the plaintiff and defendant are both foreign corporations and the action is not brought to recover damages for a cause of action for the breach of a contract made within the State or relating to property situated within the State at the time of the making thereof; that it is not brought to recover real property situated within the State or a chattel which is replevied within the State; that the cause of action did not arise within the State.

Fifth. That the action is not brought for any of the causes of action specified in section 1780 of the Code of Civil Procedure, upon which one foreign corporation is authorized to maintain an action against another foreign corporation within the State, and plaintiff has not authority to maintain the action and the court has not jurisdiction thereof.

11 Wherefore, defendant asks that the complaint be dismissed with costs.

SMITH, CONWAY & WEED,
Attorneys for Defendant, No. 21 Cortlandt Street,
New York City, N. Y.

EXHIBIT "C."

Supreme Court, Appellate Division, First Department, March, 1900.

Present: Hon. Chas. H. Van Brunt, P. J.
" Edward Patterson,
" Morgan J. O'Brien,
" George L. Ingraham,
" Chester B. McLaughlin, JJ.

ANGLO AMERICAN PROVISION COMPANY, Appellant,
against
DAVIS PROVISION COMPANY, Respondent. No. 2047.

Appeal from interlocutory judgment sustaining demurrer to complaint.

Henry Wilson Bridges, for appellant; Thomas F. Conway, for respondent.

O'BRIEN, *J.*:

The complaint seeks to establish a judgment obtained in the circuit court of Cook county, State of Illinois, under the laws of which State both corporations, plaintiff and defendant, were organized and now exist. The demurrer thereto was sustained on the ground that the court had no jurisdiction, both parties being foreign corporations.

12 We do not regard the question of whether one foreign corporation can sue another corporation in our courts as any longer open to discussion. As stated in the concurring opinion of Judge Van Brunt in Barker *vs.* Cunard Steamship Co. (91 Hun., 500): "In respect to foreign corporations the supreme court has never been a court of general jurisdiction. It has no jurisdiction of actions against foreign corporations except such as is conferred by statute. Hence the rule which ordinarily applies to this court as a court of general jurisdiction cannot obtain in actions against foreign corporations. It must appear somewhere in the record the jurisdiction exists" (see also Ladenburg *vs.* Commercial Bank of Newfoundland, 87 Hun., 269).

By section 1780 of the Code of Civil Procedure it is provided: "An action against a foreign corporation may be maintained by another foreign corporation or by a non-resident in one of the following cases. * * * Third. Where the cause of action arose within the State." Though it be conceded that an action on a foreign judgment is an action on contract, and though a foreign judgment may be enforced in this State, it does not follow that a suit brought by a foreign corporation on a foreign judgment is an action which arises in this State.

Nor do we think that there is force in the further contention that

section 1780 of the code is unconstitutional as violative of the provision of the United States Constitution that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." The present case is analogous to that of Chemung Canal Bank *vs.* Lowery (93 U. S., 72), where a State statute of limitations was attacked as repugnant to the same clause of the Constitution of the United States as is here brought before us, and it was held that the law in question did not produce any unconstitutional discrimination. Furthermore, it may be said, that in the case of a foreign corporation presenting such a question as this, this State has expressly held that as such a corporation
13 comes within our jurisdiction only by permission, express or implied, it assents to certain conditions, and even if those conditions were unconstitutional, it would be estopped from attacking them (People *vs.* Fire Ass'n, 92 N. Y., 326).

The other constitutional question raised is disposed of by the case of Robinson *vs.* Oceanic Steam Navigation Company (112 N. Y., 315, at p. 324), as follows: "It is claimed, however, that section 1780 of the code, so far as it discriminates between resident and non-resident plaintiffs, is repugnant to section 2 of article 4 of the Federal Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. This section makes no discrimination between citizens, but between residents and non-residents. Without attempting to define the full scope of the constitutional provision, it is sufficient to say that it has no application to a case like this, and there are numerous decisions to that effect." In the same opinion, the learned judge quotes with approval what is said in Davidsburgh *vs.* Knickerbocker Life Insurance Company (90 N. Y., 526): "There are, no doubt, many cases where the court having jurisdiction over the subject matter may proceed against a defendant who voluntarily submits to its decision, but where the State prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

Judgment affirmed with costs.

All concur.

14 Circuit Court of the United States for the Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator of the Goods, Chattels, and Credits Which were of Julius Davis, Deceased, and American Surety Company, Defendants.

The joint and several demurrer of the defendants, Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, The Merchants' National Bank of Plattsburgh, and Henry Davis, as administrator of the goods, chattels, and credit- of Julius Davis, deceased, to the bill of complaint of Anglo-American Provision Company.

These defendants, by protestation, not confessing or admitting all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill and for causes of demurrer show:

First. That it appears by the said bill of complaint that
15 the complainant herein, The Anglo-American Provision Company and also the defendant The Davis Provision Company, are both corporations organized and existing under the laws of the State of Illinois, and that this suit is not one in which the controversy is between citizens of different States.

Second. That it does not appear by the said bill of complaint that the suit is one arising under the Constitution or laws of the United States, or treaties made under their authority.

Third. That said complainant has not in and by said bill made or stated such a cause as does or ought to entitle it to any such relief as is thereby sought and prayed for from or against these defendants.

Wherefore, these defendants allege that this honorable court is without jurisdiction to entertain this cause, and for that and divers other good causes of demurrer appearing upon the face of said bill of complaint, these defendants demur thereto and pray the judgment of this honorable court whether they shall be compelled to make any other or further answer to the said bill, and to be hence dismissed with their reasonable costs in this behalf sustained.

Dated, August, 1900.

SMITH, CONWAY & WEED,
Solicitors and of Counsel for the Defendants, Davis Provision Company, Weeds, Smith, Conway, Merchants National Bank, and Davis, as Administrator, No. 21 Courtlandt Street, New York City.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

New York, August, 1900.

FRANK E. SMITH,
Of Counsel for said Defendants.

16 STATE OF NEW YORK, }
County of Clinton, Northern District of New York. }

John M. Wever, being duly sworn, says, I am cashier of The Merchants' National Bank of Plattsburgh, one of the defendants herein. The foregoing demurrer is not interposed for delay.

JOHN M. WEVER.

Sworn to before me this 28th day of August, 1900.

WM. V. S. WOODWARD,
U. S. Commissioner, N. D. of N. Y.

STATE OF NEW YORK, }
County of Clinton, Northern District of New York. }

Smith M. Weed, Frank E. Smith, Thomas F. Conway and Henry Davis, being severally duly sworn, each for himself, says: I am one of the defendants herein. The foregoing demurrer is not interposed for delay.

SMITH M. WEED.
FRANK E. SMITH.
THOMAS F. CONWAY.
HENRY DAVIS.

Severally sworn before me this 29th day of August, 1900.

WM. V. S. WOODWARD,
U. S. Commissioner, Northern District of New York.

STATE OF NEW YORK, }
County of Clinton, Northern District of New York. }

Henry Davis, being duly sworn, says: I am president of Davis Provision Company, one of the defendants herein. The foregoing demurrer is not interposed for delay.

HENRY DAVIS.

Sworn before me this 29th day of August, 1900.

WM. V. S. WOODWARD,
U. S. Commissioner, Northern District of New York.

17 STATE OF NEW YORK, }
County of Clinton, Northern District of New York. }

George S. Weed, being duly sworn, says: I am one of the defendants herein. The foregoing demurrer is not interposed for delay.

GEORGE S. WEED.

Sworn before me this 29th day of August, 1900.

NELLIE M. FAILEY,
[L. S.] *Notary Public, Clinton County.*

18 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY *against* DAVIS PROVISION COMPANY ET AL. } In Equity.

Opinion of Wheeler, J., Overruling Demurrer.

These corporations are both of the State of Illinois. The bill alleges, in short substance, that the plaintiff, in 1899, recovered judgment against the defendant, The Davis Provision Company, in Illinois, for $5,049.98, no part of which has been paid, and that the defendant is insolvent; that defendant has recovered judgment arising out of the same transactions against the plaintiff and its surety on an appeal bond in New York for $9,678.64; and that the plaintiff has brought suit in the State court of New York to have its judgment set off against the defendant's judgment, which has been denied because of section 1780 of the Code of Civil Procedure, which provides that—

An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

19 3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

The Constitution of the United States provides, article IV.:

"SECTION 1. Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And the laws of the United States provide, by the Revised Statutes:

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

"SEC. 1979. Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or

other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

And by section 629, that the circuit courts shall have jurisdiction:

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, or any right, privilege or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal
20 rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

This suit is brought for the deprivation of the right to have these judgments, which are, according to the allegations of the bill, in effect mutual, set off against each other in New York. The bill is demurred to for want of jurisdiction and of equity, and the cause has now been heard upon the demurrer.

That these judgments are, upon these allegations, proper subjects of equitable offset upon general principles of law is not, and could not well be, much disputed; but the principal argument against the bill is based upon the idea that it is brought to review the decision of the State court. This is not, however, the theory of the bill at all, as it is now here understood. The decision of the State courts may have been entirely correct under that law of the State limiting the right of a foreign corporation to sue in those courts; but whether correct or mistaken, the plaintiff has been deprived of its right of offset under color of that statute of the State, and this suit is not at all framed to review in any way the judgment by which this was done, but for independent relief under these laws of the United States, provided for because of that statutory deprivation. The State may have the right to exclude foreign corporations from its courts, or to limit suits by them there (Pembina *vs.* Pennsylvania, 125 U. S., 181), but then that exclusion or limitation, if of a right secured by the Constitution and laws, may afford ground for the relief deprived of in the courts of the United States. Full faith and credit to the Illinois judgment is not only not given to the plaintiff in New York, but the plaintiff is deprived of the right, by being deprived of the right to sue, to have any faith or credit whatever given there to that judgment. The right of equitable offset arises under the general principles of law, but the right to have it done in this manner arose under the Constitution and laws of the United States (Central National Bank *vs.* Stevens,
21 169 U. S., 532; N. W. Fertilizing Co. *vs.* Hyde Park, 3 Biss., 480).

Demurrer overruled. Defendants to answer over by December 10.

HOYT H. WHEELER.

Henry Wilson Bridges, for plaintiff.
Frank E. Smith, for defendants.

Indorsed: Anglo-American Provision Co. *vs.* Davis Provision Co. *et al.* Opinion, Wheeler, *J.* U. S. circuit court. Filed Nov. 17, 1900. John A. Shields, clerk.

22 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, THOMAS F. CONWAY, GEORGE S. WEED, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator of the Goods, Chattels, and Credits of Julius Davis, Deceased, and American Surety Company, Defendants. } In Equity.

The joint and several answers of the defendants, Smith M. Weed, The Merchants' National Bank of Plattsburg, and Henry Davis, as administrator of Juiius Davis, deceased, to the bill of complaint herein of The Anglo-American Provision Company, complainant, as amended by order of March 22, 1901.

The defendants, Smith M. Weed and The Merchants' National Bank of Plattsburg, and Henry Davis, as administrator of Julius Davis, now and at all times saving and reserving to themselves all right of exceptions to said bill of complaint, for answer thereto say:

I. That they have been informed, and believe it to be true, that the complainant herein brought an action against the Davis Provision Company in the circuit court of Cook county, Illinois, on or about November 4, 1893; that the Davis Provision Company appeared therein and that such proceedings were had therein
23 that on or about January 6, 1899, judgment was rendered in favor of the plaintiff therein (the present complainant) against the Davis Provision Company, for $5,049.98, no part of which has been paid, but these defendants, for greater certainty, crave leave to refer to the record of said judgment when the same shall be produced in court.

II. They admit that on or about June 12, 1894, the Davis Provision Company brought an action in the supreme court of the State of New York, in Clinton county, against the present complainant, The Anglo-American Provision Company, together with Fowler Brothers (Limited), an English corporation; that such proceedings were had therein that on or about December 13, 1895, judgment was rendered by said supreme court in favor of the Davis Provision Company and against the Anglo-American Provision Company and Fowler Brothers (Limited), for the sum of $9,241.82; but they deny that said judgment was sustained against said defendants jointly on the ground that said corporations were found by the referee who tried the cause to be identical in fact and interest as regards their business relations with the Davis Provision Company. They admit that the defendants in said action—the Anglo-American Provision

Company and Fowler Brothers (Limited)—appealed from said judgment to the appellate division of the supreme court, which modified the said judgment by striking therefrom the sum of $1,574.96, and a further sum equal to five per cent. of said $1,574.96, and, as so modified, affirmed the same; that thereafter, and on or about October 30, 1897, said Anglo-American Provision Company and Fowler Brothers (Limited) appealed from said judgment of the appellate division to the court of appeals of the State of New York, which on July 16, 1900, affirmed the same.

III. These defendants, further answering, say that they are
24 informed and believe it to be true that, on or about November 21, 1899, the complainant herein brought an action against the Davis Provision Company in the supreme court of the State of New York, a copy of the complaint therein being annexed to the bill of complaint herein as "Exhibit A;" that the Davis Provision Company appeared and demurred to the complaint, a copy of the demurrer being annexed to the bill of complaint herein as "Exhibit B;" that such proceedings were had in said action that, on February 24, 1900, the said supreme court rendered judgment therein, sustaining the said demurrer and dismissing the said complaint; that the plaintiff therein (the present complainant) appealed from said judgment to the appellate division of the supreme court of the State of New York, which, on or about May 4, 1900, rendered judgment affirming the said judgment in favor of the Davis Provision Company on its demurrer, and that in connection with such judgment said appellate division handed down an opinion, a copy of which is annexed to the bill of complaint herein as "Exhibit C," but for greater certainty as to the proceedings in said action, these defendants crave leave to refer to the record of said judgment when the same shall be produced in court.

IV. These defendants deny that the judgments obtained against the Davis Provision Company in the courts of Illinois by the complainant herein arose out of the same transaction or transactions as the judgment obtained by the Davis Provision Company against the complainant herein jointly with Fowler Brothers (Limited) in the courts of the State of New York.

V. These defendants, further answering, admit that it is impossible for the complainant herein to obtain a set-off of the judgment rendered in its favor by the courts of Illinois against the judgment in favor of the Davis Provision Company rendered by the courts of New York, but they deny that such impossibility results from the
25 decision of the appellate division of the supreme court of the State of New York mentioned in the bill of complaint herein, and they allege that such impossibility is because the complainant is not legally or equitably entitled to such set-off.

VI. These defendants deny that section 1780 of the New York Code of Civil Procedure is in any respect unconstitutional or void.

VII. These defendants, further answering, admit that they and each of them not only claim to have, but have an interest by assignment of the said judgment obtained by the Davis Provision Com-

pany against the complainant herein jointly with Fowler Brothers (Limited), and these defendants further say that such interest is the full, absolute and complete ownership of said judgment and of all money due and to grow due thereon, subject only to such lien (if any) as the defendants Frank E. Smith, Thomas F. Conway and George S. Weed may have thereon for professional services as attorneys and counsellors-at-law in procuring the same.

VIII. These defendants, further answering, say that it is not true and they deny that the assignments of the said judgment in favor of the Davis Provision Company held by them were obtained without consideration, or with full or any knowledge of complainant's rights in the premises, or that such assignments were or are, or that either of them was or is, in any respect invalid or void as against the complainant herein or otherwise.

IX. These defendants, further answering, say: That they are informed, and believe it to be true, that at the time the Davis Provision Company brought its action in the supreme court of the State of New York against the complainant herein and Fowler Brothers (Limited), the cause of action (if any) claimed by the Anglo-American Provision Company to exist in its favor against the Davis Provision Company had become due and an action was then
26 pending on it in the courts of Illinois against the Davis Provision Company, as by reference to the bill of complaint herein appears; that the transactions which gave rise to the cause or causes of action claimed to exist by the Anglo-American Provision Company in its favor against the Davis Provision Company all arose out of contracts between the two parties, but entirely separate and distinct from the transactions which gave rise to the cause of action upon which the Davis Provision Company brought its action against the complainant herein and Fowler Brothers (Limited) in the courts of New York, as aforesaid; that the Anglo-American Provision Company, though claiming to be a creditor of the Davis Provision Company with respect to matters arising out of contracts made by it with that company, did not, when sued by it in the supreme court of New York, set up or claim any set-off or counterclaim in its favor against the Davis Provision Company, but denied and disputed the validity of the claims made by that company, and as regards its own alleged claims against the Davis Provision Company, it elected to abide by its action thereon then pending in the courts of Illinois.

X. These defendants, further answering, say: That on or about May 25, 1895, and while the action brought by the Davis Provision Company in the courts of New York was pending, at issue and undetermined, the said Davis Provision Company, for a full and valuable consideration, assigned and transferred to these defendants, Smith M. Weed, The Merchants' National Bank of Plattsburgh, and to Julius Davis, all the claims, demands and causes of action against the complainant herein, The Anglo-American Provision Company, and against Fowler Brothers (Limited), being the same causes of action set forth in the complaint in its action then pending in the supreme court of the State of New York brought by said Davis Provision Company,

the rights acquired by said Julius Davis, however, being subject to those of said Weed and The Merchants' National Bank of Plattsburgh;

27 that such assignment was made to said Weed to indemnify and protect him against any liability by reason of his having on or about October 23, 1893, made and indorsed certain promissory notes, at the request and for the accommodation of the Davis Provision Company and to enable said company to procure from defendant The Merchants' National Bank of Plattsburgh, N. Y., a loan of $13,500, then made to it by said bank; and in pursuance and performance of an agreement made by and between the Davis Provision Company, Smith M. Weed and the Merchants' National Bank of Plattsburgh, on or about October 23, 1893, when said loan was made, that the payment thereof should be secured by the claims of the Davis Company against the Anglo-American Provision Company and Fowler Brothers (Limited), and that said Weed, for his own protection and for the security of the said bank, should have a lien on the said claims; that the said action was continued after the said assignment in the name of the original plaintiff, The Davis Provision Company, until December 13, 1895, when judgment was entered therein in favor of the Davis Provision Company and against the complainant herein and Fowler Brothers (Limited), as aforesaid, which judgment, though entered in the name of the Davis Provision Company, then was, ever since has been and now is the property of these defendants; that the defendants, after the assignment to them, as aforesaid, caused the said action against the present complainant and Fowler Brothers (Limited) to be prosecuted to judgment, as aforesaid, and also defended the said judgment upon the appeal taken against it as above stated; and that at the time said judgment was entered, to wit, December 13, 1895, and said appeals taken, there was no judgment in existence in the courts of Illinois or elsewhere in favor of the complainant herein and against said Davis Provision Company.

28 That said Julius Davis died on or about the 23d day of September, 1898, and that this defendant, Henry Davis, was duly appointed administrator of his estate by the surrogate's court of Clifton county, New York, that being a court of competent jurisdiction, on or about December 19, 1898, and letters of administration were then duly issued to him, which are still in full force.

XI. The defendants, further answering, say that they are informed and believe it to be true that the complainant herein did not prosecute the said action in the courts of Illinois with due, or any, diligence; but, on the contrary, allowed the same to remain untried on the calendar of the circuit court of Cook county for a long time after the same had been reached in its order thereon, and might have been tried, and until long after judgment had been rendered in favor of the Davis Provision Company and against the present complainant in the courts of New York.

Wherefore, these defendants claim and insist that the laches and delay of the complainant in prosecuting its said action in the courts of Illinois have deprived it of the right (if such right ever existed,

which these defendants deny) of setting the one judgment off against the other.

XII. And these defendants, further answering, deny that there is any other matter, cause or thing in the complainant's bill of complaint contained material or necessary for these defendants to make answer unto which is not herein and hereby sufficiently answered, confessed, traversed, avoided or denied.

All of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court
29 shall direct, and humbly pray to be hence dismissed, with their reasonable costs, in this behalf most wrongfully sustained.

[SEAL.]

SMITH M. WEED,
THE MERCHANTS' NATIONAL BANK OF PLATTSBURG,
By A. GUIBORD, *Pres't.*
HENRY DAVIS.
As Administrator of Julius Davis Est.

SMITH, CONWAY & WEED,
Solicitors for said Defendants.
FRANK E. SMITH, *Counsel.*

STATE OF NEW YORK, }
Northern District of New York, County of Clinton, } ss:

Smith M. Weed, being duly sworn, says:

I am one of the defendants in the bill of complaint brought in this court by the Anglo-American Provision Company. I have read the foregoing answer of the defendants, The Merchants' National Bank of Plattsburgh, Henry Davis, as administrator, and myself, and know the contents thereof, and so far as the same relates to my own acts or deeds it is true of my own knowledge, and so far so it relates to the acts or deeds of any other person or corporation I believe if to be true.

SMITH M. WEED.

Sworn to before me this 10th day of December, 1900.

[L. S.] WM. V. S. WOODWARD,
U. S. Comm'r, N. D. of N. Y.

30 STATE OF NEW YORK, }
Northern District of New York, County of Clinton, } ss:

Alfred Guibord, being duly sworn, says:

I am the president and an officer of the Merchants' National Bank of Plattsburgh, one of the defendants in the bill of complaint herein of the Anglo-American Provision Company.

I have read the foregoing answer of the defendants, Smith M. Weed, Henry Davis, as administrator, and The Merchants' National Bank of Plattsburgh, and know the contents thereof, and so far as the

same relates to the acts or deeds of the Merchants' national bank it is true of my own knowledge, and so far as it relates to the acts or deeds of any other person or corporation I believe it to be true.

The seal affixed to the foregoing answer is the corporate seal of the Merchants' National Bank of Plattsburgh.

ALFRED GUIBORD.

Sworn to before me this 10th day of December, 1900.

[L. S.] WM. V. S. WOODWARD,
U. S. Comm'r, N. D. of N. Y.

STATE OF NEW YORK,
Northern District of New York, County of Clinton, } ss:

Henry Davis, being duly sworn, says:

I am administrator of Julius Davis, deceased, and as such administrator one of the defendants in the bill of complaint of The Anglo-American Provision Company, complainant herein.

I have read the foregoing answer of Smith M. Weed, The Merchants' National Bank of Plattsburgh and myself, and so far
31 as the same relates to my own acts or deeds it is true of my own knowledge, and so far as the same relates to the acts or deeds of any other person or corporation I believe it to be true.

HENRY DAVIS.

Sworn to before me this 10th day of December, 1900.

[L. S.] WM. V. S. WOODWARD,
U. S. Comm'r, N. D. of N. Y.

United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, THOMAS F. CONWAY, GEORGE S. WEED, Merchants' National Bank of Plattsburgh, HENRY DAVIS, as Administrator of the Goods, Chattels, and Credits of Julius Davis, Deceased, and American Surety Company, Defendants. } In Equity.

The answer of The Davis Provision Company, one of the defendants, to the bill of complaint herein of the Anglo-American Provision Company, complainant.

The defendant, The Davis Provision Company, now and at
32 all times hereinafter saving and reserving to itself all right of exceptions to said bill of complaint, for answer thereto says:

I. It admits that the complainant herein brought an action against it in the circuit court of Cook county, Illinois, on or about November 4, 1893; that this defendant appeared in said action, and

that such proceedings were had therein that on or about January 6, 1899, judgment was rendered in favor of the plaintiff therein (the present complainant) and against this defendant, for $5,049.98, no part of which has been paid, and that said judgment, by the laws of Illinois, draws interest at the rate of five per cent. per annum.

II. It admits that on or about June 12, 1894, it brought an action in the supreme court of the State of New York, in Clinton county, against the present complainant, The Anglo-American Provision Company, together with Fowler Brothers (Limited), an English corporation; that such proceedings were had therein that on or about December 13, 1895, judgment was rendered by said supreme court in favor of this defendant and against the Anglo-American Provision Company and Fowler Brothers (Limited), for the sum of $9,241.82; but they deny that said judgment was sustained against said defendants jointly on the ground that said corporations were found by the referee who tried the cause to be identical in fact and in interest, as regards their business relations with the Davis Provision Company. They admit that the defendants in said action—the Anglo-American Provision Company and Fowler Brothers (Limited)—appealed from said judgment to the appellate division of said supreme court, which modified the said judgment by striking therefrom the sum of $1,574.96, and a further sum equal to five per cent. of said $1,574.96, and as so modified affirmed the same; that thereafter and on or about October 30, 1897, the said Anglo-American Provision Company and Fowler Brothers (Limited) appealed from the said judgment of the appellate division to the court of
33 appeals of the State of New York, which, on July 16, 1900, affirmed the said judgment as modified by the appellate division.

III. It admits that on or about November 21, 1899, the complainant herein brought an action against this defendant in the supreme court of the State of New York, a copy of the complaint therein being annexed to the bill of complaint herein as "Exhibit A;" that this defendant appeared in said action and demurred to the complaint, a copy of the said demurrer being annexed to the bill of complaint herein as "Exhibit B;" that such proceedings were thereupon had in said action that on February 21, 1900, the said supreme court rendered judgment therein sustaining the demurrer of this defendant and dismissing the said complaint; that the plaintiff therein—The Anglo-American Provision Company—appealed from said judgment to the appellate division of the supreme court of the State of New York, which, on or about May 4, 1900, rendered judgment affirming the said judgment in favor of this defendant on the demurrer, and that, in connection with such judgment, said appellate division handed down an opinion, a copy of which is annexed to the bill of complaint herein as "Exhibit C."

IV. This defendant denies that the judgment obtained against it in the courts of Illinois by the complainant herein arose out of the same transaction or transactions as the judgment obtained by this

defendant against the complainant herein jointly with Fowler Brothers (Limited) in the courts of New York.

V. This defendant admits that it is impossible for the complainant herein to obtain a set-off of the judgment rendered in its favor by the courts of Illinois against the judgment in favor of this defendant rendered by the courts of New York, but it denies that such impossibility results from the decision of the appellate division of the supreme court of the State of New York, mentioned in
34 the bill of complaint herein, and it alleges that such impossibility is because the complainant is not legally or equitably entitled to such set-off.

VI. This defendant denies that section 1780 of the New York Code of Civil Procedure is in any respect unconstitutional or void.

VII. This defendant admits that the defendants Smith M. Weed, Merchants' National Bank of Plattsburgh, Frank E. Smith, Thomas F. Conway and George S. Weed, and Henry Davis, as administrator of Julius Davis, claim to have a lien upon or interest in the judgment obtained by this defendant against the complainant herein.

VIII. Further answering, this defendant says it is not true and it denies that the lien upon or assignment of the said judgment in its favor held by the defendants Smith M. Weed, Merchants' National Bank of Plattsburgh, Frank E. Smith, Thomas F. Conway, George S. Weed and Henry Davis, as administrator, or either of them, was obtained without consideration, or with knowledge of plaintiff's rights in the premises, or that such liens or assignments were or are, or either of them was or is, invalid or void as against the complainant or otherwise.

IX. This defendant, further answering, says: That it is informed and believes it to be true, that at the time it brought its action in the supreme court of the State of New York against the complainant herein, together with Fowler Brothers (Limited), the cause of action, if any, claimed by the Anglo-American Provision Company to exist in its favor, had become due, and that an action thereon was then pending in the courts of Illinois against this defendant, as by reference to the bill of complaint herein appears; that the transactions which gave rise to the cause or causes of action claimed to exist by the Anglo-American Provision Company in its favor against this defendant all arose out of contracts between the two parties,
35 but entirely separate and distinct from the transactions and contracts which gave rise to the cause of action upon which this defendant obtained its judgment against the complainant in the courts of New York, as aforesaid; that the complainant, The Anglo-American Provision Company, though claiming to be a creditor of this defendant with respect to matters arising out of contracts made by it with this defendant, when sued by this defendant in the supreme court of the State of New York, as alleged in the bill of complaint, did not set up or claim any offset or counter-claim in its favor against this defendant, but denied and disputed the validity of the claim made by this defendant, and as regards its own alleged

claims against this defendant, it elected to abide by its action thereon then pending in the courts of Illinois.

X. This defendant, further answering, says: That on or about May 25, 1895, and while the action brought by this defendant in the courts of New York against the complainant herein and Fowler Brothers (Limited) was pending, at issue and undetermined, this defendant, for a full and valuable consideration, assigned and transferred to the defendants, Smith M. Weed, and The Merchants' National Bank of Plattsburgh, and to Julius Davis, all its claims, demands and causes of action against the complainant herein, The Anglo-American Provision Company, and against Fowler Brothers (Limited), being the same causes of action set forth in the complaint in the action then pending in the supreme court of the State of New York, brought by this defendant, as aforesaid; that the right of Julius Davis under said assignment was subject to the right of said Weed and the Merchants' National Bank of Plattsburgh; that the said action was continued in the name of this defendant, but for the benefit of said assignees, until December 13, 1895, when judgment was rendered therein in favor of this defendant and against the complainant herein and Fowler Brothers (Limited), as aforesaid,
36 which judgment, though entered in the name of this defendant, then was and ever since has been the property of said assignees; and that at the time the said judgment was entered, to wit, December 13, 1895, there was no judgment in existence in the courts of Illinois or elsewhere in favor of the complainant herein against this defendant.

XI. This defendant, further answering, denies that there is any other matter, cause or thing in the complainant's bill of complaint contained material or necessary for this defendant to make answer unto which is not herein and hereby sufficiently answered, confessed, traversed, avoided or denied.

All of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[SEAL.] THE DAVIS PROVISION COMPANY,
By HENRY DAVIS, *President.*

SMITH, CONWAY & WEED,
Solicitors for Defendant The Davis Provision Company.
FRANK E. SMITH,
Of Counsel for said Defendant.

STATE OF NEW YORK, }
Northern District of New York, County of Clinton, } ss:

Henry Davis, being duly sworn, says:

I am president of The Davis Provision Company, one of the defendants in the bill of complaint brought in this court by the Anglo-American Provision Company.

I have read the foregoing answer of the Davis Provision Com-

pany and know the contents thereof, and, so far as the same relates to the acts or deeds of the Davis Provision Company it is
37 true of my own knowledge, and so far as it relates to the acts or deeds of any other person or corporation I believe it to be true.

HENRY DAVIS.

Sworn to before me this — day of December, 1900.
[L. S.] WILLIAM V. S. WOODWARD,
U. S. Comm'r, N. D. of N. Y.

United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, THOMAS F. CONWAY, GEORGE S. WEED, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator of Julius Davis, Deceased, and American Surety Company, Defendants. } In Equity.

The joint and several answer of the defendants Frank E. Smith, Thomas F. Conway, and George S. Weed to the bill of complaint herein of The Anglo-American Provision Company, complainant.

We, the defendants, Frank E. Smith, Thomas F. Conway and George S. Weed, answering the bill of complaint herein, say:
38 I. On information and belief, we deny so much of said bill of complaint as alleges that the judgment obtained by the complainant against the Davis Provision Company in the courts of Illinois arose out of the same transactions as the judgment obtained by the Davis Provision Company against the present complainant in the courts of New York.

II. We admit that it is impossible for the complainant to obtain a set-off of the Illinois judgment in its favor against the New York judgment in favor of the Davis Provision Company; but we deny that such impossibility is the result of the decisions of the New York courts mentioned in the complaint, and we say that such set-off cannot be had by the complainant because it is not legally or equitably entitled to it.

III. We deny that section 1780 of the New York Code of Civil Procedure is unconstitutional or void.

IV. We admit that we claim a lien on the judgment against complainant, mentioned in said bill of complaint, but we deny that such lien was or is without consideration, or that it is in any respect invalid or void as against the complainant or otherwise.

V. Further answering, we say that we are attorneys and counsellors at law and were practicing as such at Plattsburgh, N. Y., under the firm name of Weed, Smith & Conway, from prior to 1894 to 1899. That on or about June, 1894, we were retained by the Davis Provision Company to bring, and did bring, an action against the

Anglo-American Provision Company and Fowler Brothers (Limited), being the same action mentioned in the bill of complaint herein. We prosecuted such action in behalf of said Davis Provision Company from June, 1894, to May, 1895, when said Davis Provision Company assigned the claims in suit to Smith M. Weed, the Merchants National Bank of Plattsburgh and Julius Davis. Thereupon we were retained by said Weed and said bank, as
39 well as by the representatives of the Davis Provision Company, to continue the prosecution of said action, which was done in the name of the Davis Provision Company, and on December 13, 1895, judgment was entered, as in the bill of complaint alleged. The Anglo-American Provision Company and Fowler Brothers (Limited) appealed from said judgment to the appellate division of the supreme court, and we were retained and instructed by said assignees of said judgment and the representatives of the Davis Provision Company to defend said judgment on such appeal, which we did. The appellate division modified said judgment as in the bill of complaint stated and, as modified, affirmed the same, and the Anglo-American Provision Company and Fowler Brothers (Limited) appealed therefrom to the court of appeals of New York. We were instructed by the assignees of said judgment and the representatives of the Davis Provision Company to defend said appeal, which we did, and in May, 1900, the said court of appeals affirmed the said judgment.

We were also, in or about June, 1894, retained by the Davis Provision Company to prosecute actions against the Anglo-American Provision Company and Fowler Brothers (Limited) other than that which resulted in the judgment mentioned in the bill of complaint, the causes of action so sued on being similar to that sued on in the action mentioned in the complaint, separate actions being brought for the sake of convenience, but when they came to trial they were all tried together before the same referee. In the course of said litigation we paid out and expended large sums of money for the necessary disbursements of said actions.

We have not been paid for our services and disbursements in the said actions, and we claim a lien on the judgment mentioned in the bill of complaint, procured by our efforts against the complaint, for the reasonable value of all our services and disbursements in connection with all the litigation between the parties, which lien
40 is superior to any right of set-off on the part of said complainant. All of which matter we are ready to aver, maintain and prove as this honorable court shall direct, and we pray to be hence dismissed, with our reasonable costs in this behalf most wrongfully sustained.

FRANK E. SMITH.
THOMAS F. CONWAY.
GEORGE S. WEED,
By FRANK E. SMITH,
His Solicitor.

SMITH, CONWAY & WEED,
Solicitors for said Defendants.
FRANK E. SMITH, *Counsel.*

STATE OF NEW YORK,
Southern District of New York, City and County of New York, } ss:

Frank E. Smith and Thomas F. Conway, being severally duly sworn, each for himself, says:

That he is a defendant in the bill of complaint brought herein by the Anglo-American Provision Company.

That he has read the foregoing answer, and knows the contents thereof, and that so far as the same relates to his own acts or the acts of the firm of Weeds, Smith & Conway, it is true of his own knowledge, and so far as it relates to the acts or deeds of any other person, firm or corporation, he believes it to be true.

FRANK E. SMITH.
THOMAS F. CONWAY.

Sworn to before me this 13th day of December, 1900.
[L. S.]
FRANK WALLING,
Notary Public, N. Y. Co.

41 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator of the Goods, Chattels, and Credits of Julius Davis, Deceased, and American Surety Company, Defendants.

The replicant, the Anglo-American Provision Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of the defendants, Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as administrator of the goods, chattels and credits of Julius Davis, deceased, for replication thereto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied to by this replicant.

Without this, that any other matter or thing in the said answer contained material or effectual in the law to be
42 replied unto, confessed or avoided, traversed or denied is true; all of which matters and things this replicant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

WEISER & BRIDGES,
Solicitors for Complainant.

United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Complainant,
against
DAVIS PROVISION COMPANY and Others, Defendants.

It is hereby stipulated by and between the parties to this suit as follows:

First. The following is a copy of the record of the judgment procured by the complainant in the circuit court of Cook county, Illinois, on January 6, 1899, mentioned in the bill of complaint:

Transcript of Proceedings.

UNITED STATES OF AMERICA,
State of Illinois, Cook County, } ss:

Pleas before the Honorable R. W. Clifford, one of the judges of the circuit court of Cook county, at a term thereof begun and
43 held in the court-house at Chicago, in said county and State, on the third Monday (being the 19th day) of December in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-third.

Present: Honorable R. W. Clifford, one of the judges of the circuit court of Cook county, State of Illinois; Charles S. Deneen, State's attorney; Ernst J. Magerstadt, sheriff.
Attest: JOHN A. COOKE, *Clerk.*

Be it remembered, that heretofore, to wit, on the 4th day of November, A. D. 1893, a certain præcipe for summons was filed in the office of the clerk of said court, and thereupon there issued out of said office and under the seal thereof the People's writ of summons directed to the sheriff of Cook county to execute which said præcipe and said writ, together with the return of the sheriff thereon indorsed are in words and figures following, to wit:

"*Præcipe, Circuit Court.*

STATE OF ILLINOIS,
Cook County, } ss:

Circuit Court of Cook County, to November Term, A. D. 1893.

ANGLO-AMERICAN PROVISION COMPANY, an Illinois Corporation, Plaintiff,
against
DAVIS PROVISION COMPANY, an Illinois Corporation, Defendant.
} Assumpsit. Damages, $5,000.

The clerk of said court will issue a summons in the above-
44 entitled cause to said defendant in a plea of trespass on the case upon promises to the damage of said plaintiff in the sum

of five thousand dollars, direct the same to the sheriff of Cook county to execute and make it returnable to the November term of said court, A. D. 1893.

HERRICK, ALLEN & BOYESEN,
Plaintiff's Attorneys.

To Frank J. Gaulter, Esq., clerk.

Chicago, November 4, 1893."

Summons lost and connot be found.

And afterward, to wit, on the 10th day of November, A. D. 1893, a certain declaration was filed in the office of the clerk of said court in words and figures following, to wit:

"In the Circuit Court of Cook County, to November Term, A. D. 1893.

STATE OF ILLINOIS, } ss:
Cook County, }

Anglo-American Provision Company, which is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, plaintiff in this suit, by Herrick, Allen & Boyesen, attorneys, complain of Davis Provision Company, which is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, defendant in this suit, summoned, etc., of a plea of trespass, on the case on promises:

For that whereas, the said defendant heretofore, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and ninety-three, at Chicago, to wit, at the county aforesaid, became and was indebted to the said plaintiff in the sum of five thousand dollars of lawful money of the United States of America for divers goods, wares and merchandise, by the said plaintiff
45 before that time sold and delivered to the said defendant and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterward requested.

And whereas, also, the said defendant afterward, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant sold and delivered to the said defendant divers other goods, wares and merchandise of the said plaintiff, the said defendant then and there undertook, and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares and merchandise at the time of the sale and de-

livery thereof were reasonably worth when the said defendant should be thereunto afterward requested; and the said plaintiff avers that the said goods, wares and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of five thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterward, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant, afterward, to wit: on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the further sum of five thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant and at the like request of the said defendant. And in the like sum for other money by the said plaintiff before that time paid, laid out and ex-
46 pended for the said defendant and at the like request of the said defendant. And in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff. And in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendant. And being so indebted, the said defendant, in consideration thereof, afterward, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned, when the said defendant should be thereunto be afterward requested.

And whereas, also, the said defendant afterward, to wit, on the day and year last aforesaid, and at the place last aforesaid, accounted, together with the said plaintiff, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff and then and there being in arrears and unpaid, and upon such accounting the said defendant then and there was found to be in arrears and indebted to the said plaintiff in the further sum of five thousand dollars of like lawful money as aforesaid. And being so found in arrears and indebted to the said plaintiff, the said defendant, in consideration thereof, afterward, to wit, on the day and year last aforesaid, and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterward requested.

Nevertheless, the said defendant (although often requested,
47 etc.) has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff; but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused and

still does refuse, to the damage of the said plaintiff of five thousand dollars, and, therefore, the said plaintiff brings suit, etc.

HERRICK, ALLEN & BOYESEN,
Plaintiff's Attorneys.

Copy of Account Sued On.

Davis Provision Company to Anglo-American Provision Company, Dr.

Chicago, Nov. 1, 1893. To goods, wares and merchandise sold and delivered	$5,000 00
Chicago, Nov. 1, 1893. To money lent and advanced	5,000 00
Chicago, Nov. 1, 1893. To money paid, laid out and expended	5,000 00
Chicago, Nov. 1, 1893. To money had and received to and for the use of said plaintiff	5,000 00
Chicago, Nov. 1, 1893. To money due for interest and forbearance	5,000 00
Chicago, Nov. 1, 1893. To labor, services and material	5,000 00
Chicago, Nov. 1, 1893. To balance due on account stated	5,000 00

48 *Plaintiff's Affidavit of Amount Due.*

Circuit Court of Cook County, to November Term, A. D. 1893.

ANGLO-AMERICAN PROVISION COMPANY, an Illinois Corporation,
against
DAVIS PROVISION COMPANY, an Illinois Corporation.

STATE OF ILLINOIS, }
County of Cook, } ss:

George D. Kendrick, being duly sworn, says that he is the agent for said plaintiff in this behalf and that the demand of the plaintiff in the above-entitled cause is for the price and value of goods sold and delivered to said defendant by said plaintiff, and that there is due to the plaintiff from the defendant, after allowing to it all just credits, deductions, and set-offs, four thousand and thirteen 23/100 dollars.

GEORGE D. KENDRICK.

Subscribed and sworn to before me this 8th day of November, 1893.

[SEAL.] JAMES JOHN,
Notary Public, Cook County, Ill."

49 *Statement.*

CHICAGO, *November* 6, 1893.

Messrs. Davis Provision Co., New York city, in account with Anglo-American Provision Co., Union stock yards.

1890.			
Jan. 9.	To mdse..	$146 44	
1891.			
Sept. 1.	To mdse.....	1,663 70	
1892.			
Nov. 30.	Freight, N. Y.....	7 05	
1893.			
Aug. 19.	Pfs. 25 M. Sep. wheat.....	2,256 25	
Aug. 19.	Pfs. 10 M. Sep. corn.....	175 00	
			$4,248 44
1892.			
Nov. 30.	By November brokerage.....	$127 34	
1893.			
Mar. 31.	By pfs. 15 May wheat.....	356 25	
			483 59
			$3,764 85
Nov. 6.	To interest on above to date.....		248 38
Nov. 6.	Balance due.....		$4,013 23

And afterwards, to wit, on the 8th day of December, A. D. 1893, a certain plea was *led* in the office of the clerk of said court, in words and figures following, to wit:

50 STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County, November Term, A. D. 1893.

ANGLO-AMERICAN PROVISION CO. *vs.* DAVIS PROVISION COMPANY. } Gen. No. 122,757, Term No. 22061.

And the defendant, by Page & Booth, its attorneys, comes and defends the wrong and injury when, etc., and says that it did not promise in manner and form as the plaintiff has above thereof complained against it, the defendant, and of this the defendant puts itself upon the country, etc.

PAGE & BOOTH,
Defendant's Attorneys.

And for a further plea in this behalf the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the plaintiff was before and at the time of the commencement of this suit and still is indebted to it, the defend-

ant, in the sum of seven thousand dollars for goods, chattels and effects before that time sold and delivered by the defendants to the plaintiff at its request; and in the like sum for goods, chattels and effects before that time bargained and sold by the defendant to the plaintiff at its request; and in the like sum for work and services before that time done and bestowed and materials for the same work furnished by the defendant for the plaintiff at its request; and in the like sum of money before that time lent by the defendant to the plaintiff at its request; and in the like sum for money before that time paid and expended by the defendant for the use of the plaintiff at its request; and in the like sum for money before that time
51 received by the plaintiff for the use of the defendant; and in the like sum for interest on divers sums of money before that time foreborne by the defendant to the plaintiff at its request, for divers spaces of time before then elapsed; and in the like sum for moneys found to be due from the plaintiff to the defendant, on an account then and there stated between them; which said sums of money so due from the plaintiff to the defendant as aforesaid, exceed the damages sustained by the plaintiff by reason of the non-performance by the defendant of the several supposed promises in the said declaration mentioned, and out of which said sums of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said damages. And this the defendant is ready to verify; wherefore it prays judgment if the plaintiff ought to have its aforesaid action against it, the defendant, etc.

PAGE & BOOTH,
Defendant's Attorneys.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the District Court of Cook County, of the November Term, A. D. 1893.

ANGLO-AMERICAN PROVISION COMPANY }
vs.
DAVIS PROVISION COMPANY. }

Henry Davis, being first duly sworn, deposes and says that he is the president of the defendant in the above-entitled cause, and that he verily believes that said defendant has a good defense to said suit upon the merits to the whole of the plaintiff's demand.

HENRY DAVIS.

52 STATE OF NEW YORK, } ss:
County of Clinton, }

I, Millard F. Parkhurst, a notary public in and for the county of Clinton and State of New York, do hereby certify that I am duly authorized by the laws of said State to administer oaths and affirmations upon all lawful occasions, and that on this 18th day of Novem-

ber, A. D. 1893, personally appeared before me Henry Davis, whose name is subscribed to the foregoing affidavit, and being by me first duly sworn, made oath that the said affidavit and the statements therein made are true to the best of his knowledge, information and belief.

Given under my hand and notarial seal this 18th day of November, A. D. 1893.

[SEAL.]

M. F. PARKHURST,
Notary Public in and for said County and State Aforesaid.

STATE OF NEW YORK, *Clinton County Clerk's Office,* } ss:

I, James Tierney, clerk of the said county and of the courts of record thereof, do hereby certify that M. F. Parkhurst, before whom the foregoing affidavit was made, and who has thereto signed his name, was at the time of so doing a notary public in and for said county, duly elected or appointed and sworn; that his official acts as such are entitled to full faith and credit. And further, that I am well acquainted with the handwriting of the said notary public, and verily believe the signature thereto to be genuine.

In witness whereof, I have hereunto set my hand and official seal this 18th day of November, 1893.

[SEAL.]

JAMES TIERNEY, *Clerk.*

53 *Copy of Account Pleaded in Set Off.*

Davis Provision Company,

Agents for—
Anglo-American Provision Co., Chicago.
A. C. Goodwin, Albany, N. Y.
Fowler Bros., New York.
Minnesota Packing and Provision Co., St. Paul.

P. O. box 02.
Terms.....

PLATTSBURGH, N. Y., *Nov. 24th*, 1893.

Sold to Anglo-American Provision Co., Chicago, Ill.:

To Davis Provision Co., Dr.

For amount of Stock Yards Warehouse Co.'s bills for storage on pork & cc. included in notes given to the Anglo Am. Prov. Co. June 5, 1892. This amount should be charged to the Minn. Packing & Prov. Co.'s as goods were stored for their account	$1,288 05
Interest from June 5, 1892, to date	109 91
	$1,397 96
For special services of Mr. Henry Davis, for Davis Provision Company, going to Jacksonville, Fla., in Feb., 1887, on behalf of the A. A. P. Co., to settle the business of Mr. Root	$2,500 00

Interest to be added.

Anglo-American Provision Co. to Davis Provision Co., Dr.

1891.
Dec. 31. Claim for loss on 300 tcs. S. P. hams, 12 avg. forming part of invoice of January 1, 1891, shipped to New York by A. A. P. C. without instructions.

Dr.

1891.				
Jan. 1.	300 tcs. S. P. hams 12 avg. 90,000 at 8¼			$7,987 50
	Smoking 25 tcs		$18 75	
	Freight		5 25	
	Cartage		3 75	
	Freight on 5 tcs. to Troy		1 60	
	Storage charges paid		264 02	
	Allowance made for 2 tcs. bad		48 00	
	Overhauling 54 tcs		32 40	
				373 77

54

Cr.

Sales.

100 tierces,	30,000 at	8¼		$2,550 00
20 "	6,000 "	8½		525 00
75 "	22,500 "	9		2,025 00
10 "	3,000 "	9½		285 00
5 "	1,500 "	10		150 00
5 "	1,400 "	9½		133 00
5 "	"	9		45 00
20 "	5,462 at	10		546 20
60 "	returned.			
300 "				
Balance				2,102 07
			$8,361 27	$8,361 27
Balance down, claim on account loss				$2,102 07

1891.
Dec. 31. Claim loss on 75 tcs. S. P. shoulders ex car 4165, May 26, 1891, Chicago to Syracuse, part of invoice Mar. 2, 500 tcs. at 4⅝ $6,937.50 rejected by Hammond & Co.

Dr.

	75 tcs. S. P. shoulders 22,500 at 4⅝			$1,040 62
Aug. 4.	Smok'g 5 tcs. 3.75, frt. 1.05, cartage .75		$5 55	
" 20.	Smok'g 5 tcs. 3.75, frt. 1.05, cartage .75		5 55	
Sept. 2.	Smok'g 10 tcs. 7.50, frt. 2.10, cartage 1.50		11 10	
" 2.	Frt. ctge. stge. & com. 2 tcs. shipped Low & Co., —— N. Y		1 61	
" 3.	Ret'd by D. P. Co. 1 bbl. 172 at 7c		12 04	
" 3.	Sold by Low & Co. frt. ctge. stge. & com		1 07	
Oct. 5.	Ret'd by Mulholland 8 tcs. 2,400 at 6, $144.00, frt. $2		146 00	
" 19.	Ret'd by D. P. Co. 7 bbls. 2,028 at 7	141 96		

55

1891.				
	Frt. to and from Plattsburgh 8.96 sold by Low & Co. frt. ctge. stge. & com. 6.09	$15 05		$157 01
" 28.	Ret'd by Metzger 5 tcs. 1,500 at 5½	82 50		
	Frt. 6.35, smok'g 3.75 ctg. 75	10 85		
			93 35	

Nov. 24.	Rec'd by D. P. Co. 1 bbl. 314 at 7.	21 98		
	Sold by Low & Co. frt. ctg. stg. & com	1 07		
			23 05	
				$456 63
	Inspecting and overhauling 34 tcs.			20 40
	Icing			3 00
	Frt. Chicago to Syracuse		66 98	
	Frt. Syracuse to New York		42 75	
				109 73

CR.

Aug. 4.	Sold 5 tcs. smoked, 1,372 at 6			$82 32
" 20.	" 5 " " 1,358 at 7			95 06
" 21.	" 10 " Mulholland, 3,000 at 6¼			187 50
Sept. 2.	" 10 " smoked, 538 at 2			162 66
" 24.	" 10 " Mulholland, 3,000 at 6			180 00
Oct. 5.	" 18 " Metzger & Son, 5,400 at 5½			297 00
Nov. 5.	" 5 " smoked, 1,412 at 7			98 84
Sept. 8.	" 1 bbl. smoked to Low, 186 at 2			3 72
Oct. 22.	" 7 tcs. smoked to Low, 2,003 at 1			20 03
Dec. 1.	" 1 tc. smoked to Low, 300 at 2			6 00
	72			
	Balance (24 tierces returned)			497 25
			$1,630 38	$1,630 38
	Balance down, claim on account loss			497 25

56 And afterward, to wit, on the 27th day of December, A. D. 1898, the following proceedings were had and entered of record in said court, to wit:

ANGLO-AMERICAN PROVISION COMPANY
vs.
DAVIS PROVISION COMPANY. } Assumpsit.

On the stipulation of the parties to this suit filed herein it is ordered that the order of dismissal and judgment heretofore on April 29, A. D. 1898, entered herein, be and the same is hereby set aside and vacated and this cause reinstated and redocketed as No. 1090½, and plea of set-off withdrawn.

And afterwards, to wit, on the 6th day of January, A. D. 1899, the following proceedings were had and entered of record in said court, to wit:

ANGLO-AMERICAN PROVISION COMPANY
vs.
DAVIS PROVISION COMPANY. } Assumpsit.

This cause being called for trial comes the plaintiff to this suit by its attorney; thereupon on motion of plaintiff's attorney it is ordered that leave be and the same is hereby given the plaintiff to amend by increasing the *ad damnum* to six thousand dollars, and issues being joined, it is ordered that a jury come; whereupon come the

jurors of a jury of good and lawful men, to wit: T. W. Kelly, T. Mussey, E. B. Mason, C. E. Scott, O. W. Weber, J. Weinfield,
57 J. P. Weber, P. Redmond, J. Van Straaten, W. J. Manser, C Keith, H. Laterstein, who being duly elected, tried and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence, after hearing all the evidence adduced, say we, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of five thousand forty-nine dollars and ninety-eight cents.

Therefore, it is considered by the court that the plaintiff do have and recover of and from the defendant, Davis Provision Company, its damages of five thousand forty-nine dollars and ninety-eight cents in form as aforesaid by the jury assessed, together with its costs and charges in this behalf expended, and have execution therefor.

UNITED STATES OF AMERICA, }
State of Illinois, Cook County, } ss:

I, John A. Cooke, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify that I am the keeper of the records and files of said court, and that the above and foregoing is a true, perfect and complete copy of a certain præcipe for summons filed in my office on the 4th day of November, A. D. 1893; certain declaration filed in my office on the 10th day of November, A. D. 1893; a certain plea filed in my office on the 8th day of December, A. D. 1893; a certain order made and entered of record on the 27th day of September, A. D. 1898, and a certain order made and entered of record in said court on the 6th day of January, A. D. 1899, in a certain cause lately pending in said court, on the common law side thereof, between Anglo-American Provision Company, plaintiff, and Davis Provision Company, defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Chicago, in said county, this 24th day of January, A. D. 1899.

[SEAL.] JOHN A. COOKE, *Clerk.*

58 STATE OF ILLINOIS, }
County of Cook, } ss:

I, Charles G. Neely, chief justice of the circuit court of Cook county, in the State of Illinois, hereby certify that John A. Cooke, who signed the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due form and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal at Chicago, in said county of Cook, this 24th day of January, A. D. 1899.

CHARLES G. NEELY, [SEAL.]
Chief Justice of the Circuit Court of Cook County.

UNITED STATES OF AMERICA, } ss.:
State of Illinois, Cook County, }

I, John A. Cooke, clerk of the circuit court of Cook county, in the State of Illinois (said court being a court of record), do hereby certify that the Honorable Charles G. Neely, whose name is subscribed to the annexed and foregoing certificate, was at the time of the signing thereof and now is chief justice of said circuit court, duly elected, commissioned and qualified, and that his said signature is genuine.

In witness whereof, I have signed my name and affixed the seal of said circuit court at my office in the city of Chicago, in said Cook county, this 24th day of January, 1899.

[SEAL.] JOHN A. COOKE, *Clerk.*

59 *Second.* The following is a copy of the paper marked "Defendant's Exhibit A, March 15, 1901:"

DEFENDANT'S EXHIBIT A, MARCH 15, 1901.

Whereas, the Davis Provision Company, a foreign corporation organized under the laws of the State of Illinois, and doing business in this State, is indebted and liable to Smith M. Weed in a large amount, which it is unable to pay at present,

And whereas, the said company is the owner of certain claims and causes of action against the Anglo-American Provision Company and Fowler Brothers, Limited, foreign corporations, and also against one Anderson Fowler personally, said claims and causes of action being more fully described in the complaints in each of said actions, which complaints are hereby referred to and made a part hereof for the purpose of fully describing and designating the claims, accounts and causes of action, hereby transferred and set over unto said Weed and which causes are entitled as follows, except the action brought by Henry Davis, which is named herein, but transferred by a separate instrument, to wit:

N. Y. Supreme Court, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff,
vs.
FOWLER BROTHERS, LIMITED, and ANGLO-American Provision Company, Defendants.
Actions Nos. 1 and 2.

60 United States Circuit Court, Second District of New York.

THE DAVIS PROVISION COMPANY, Plaintiff,
vs.
ANDERSON FOWLER, Defendant.

HENRY DAVIS, Plaintiff,
against
ANDERSON FOWLER, Defendant.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED.

N. Y. Supreme Court, Clinton County.

MARK J. DAVIS, Plaintiff,
vs.
FOWLER BROTHERS, LIMITED, and ANGLO-AMERICAN PROVISION Company, Defendants.

Now, therefore, for a good and valuable consideration, and
61 to secure said Weed on account of said indebtedness and liabilities of said Davis Provision Company to him, said Davis Provision Company being duly authorized, hereby assigns, transfers and sets over unto said Weed, his heirs and assigns, said causes of action and each of them, against each and all the parties against whom they exist, and money due or to grow due thereon, or which may be collected or recovered in said suits, or either of them, together with its right to prosecute said actions and each of them, and recover said claims in the name of said corporation, or otherwise.

Said Davis Provision Company also transfers, assigns and sets over to said Weed, his heirs and assigns, for the same purpose, another cause of action not yet in suit, held and owned by said Davis Provision Company against the Anglo-American Provision Company and Fowler Brothers, Limited, or one or both of them, for and on account of services performed by Henry Davis in settling a claim and performing services for said companies or one or both of them in Jacksonville, Florida, some years ago, and the right to bring suit and enforce and collect the same in the name of said company or otherwise.

Dated May 27, 1895.

DAVIS PROVISION COMPANY,
By HENRY DAVIS, *Pres't.* [SEAL.]

Signed sealed and delivered in presence of

——— ———.

STATE OF NEW YORK, } ss:
County of Clinton, }

On this 18th day of March, 1901, before me personally came Henry Davis, to me known, who, being by me duly sworn, did depose and say: That he resided in the village of Plattsburgh, New York; that he is the president of the Davis Provision Com-
62 pany, the corporation described in and which executed the above instrument, and was such president May, 1895, when said instrument was executed; that he knows the corporate seal of the Davis Provision Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

He further says that he has examined the corporate record book of the Davis Provision Company, but said book contains no record of the meeting of the directors of said company, at which the execution of said instrument was authorized.

[SEAL.] R. E. HEALEY,
Notary Public.

I, Henry Davis, for a good and valuable consideration, to me paid, and to secure Smith M. Weed for the indebtedness described and mentioned in the foregoing instrument, hereby assign and transfer to said Weed the cause of action and claim mentioned and now in suit, entitled *Henry Davis, plaintiff, vs. Anderson Fowler, defendant,* in the foregoing instrument, and the moneys due and to grow due thereon and which may be recovered therein, and hereby authorize said Weed to prosecute and conduct said action in my name or otherwise to recover the said claim, and hereby further refer to the complaint in said action to more fully describe the cause of action and the claim hereby assigned.

H. DAVIS.

STATE OF NEW YORK, } ss:
County of Clinton, }

On this 18th day of March, 1901, before me personally came Henry Davis, to me personally known and known to me to be
63 the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

[SEAL.] R. E. HEALEY,
Notary Public.

The Davis Provision Company hereby authorizes and directs Mark J. Davis, plaintiff, in an action in the foregoing assignment, which action is entitled *Mark J. Davis, plaintiff, vs. Fowler Brothers, Limited, and Anglo-American Provision Company,* to execute and deliver to Smith M. Weed an assignment of the cause of action and claims mentioned and involved in said suit for the same purpose for which the other causes of action are set over to him, as men-

tioned in the assignment from said company to said Weed, hereto annexed.

DAVIS PROVISION CO.,
By HENRY DAVIS, [SEAL.]
President.

STATE OF NEW YORK, }
County of Clinton, } *ss:*

On this 18th day of March, 1901, before me personally came Henry Davis, who, being by me duly sworn, did depose and say: That he resided in the village of Plattsburg, New York; that he is the president of the Davis Provision Company, the corporation described in and which executed the above instrument, and was such president in May, 1895, when said instrument was executed; that he knows the corporate seal of the Davis Provision Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

[SEAL.] R. E. HEALEY,
Notary Public.

64 I, Mark J. Davis, for a good and valuable consideration to me paid by Smith M. Weed, and to secure him for the claim, liability and indebtedness from the Davis Provision Company to him, mentioned in the annexed assignment from said company to him, hereby assign, transfer and set over to said Weed the cause of action and demand in the said action in said assignment entitled *Mark J. Davis, plaintiff, vs. Fowler Brothers, Limited, and Anglo-American Provision Company, defendants*, which claim and cause of action had been assigned to me for the purpose of collection, the avails or recovery, however, to belong to said Davis Provision Company. This assignment is made in connection with the foregoing assignment and transfer from said Davis Provision Company to said Weed to perfect and complete said Weed's title and interest in and to said cause of action, claim and demand, for the purposes stated in said assignment from said company to him, being duly authorized to make this assignment and transfer by said Davis Provision Company.

Dated March 27, 1895.

MARK J. DAVIS.

CLINTON COUNTY, *ss:*

On this 18th day of March, 1901, before me personally came Mark J. Davis, to me personally known and known to me to be the person described in and who executed the above instrument and acknowledged that he executed the same.

[SEAL.] R. E. HEALEY,
Notary Public.

Third. After the paper marked "Defendant's Exhibit A, March 15, 1901," was executed, the actions therein mentioned were continued in the name of the original plaintiffs.

Fourth. Of the suits or actions mentioned in said Exhibit A, the actions therein, entitled "The Davis Provision Company
65 against Fowler Brothers, Limited, and Anglo-American Provision Company," Nos. 1 and 2, were prosecuted to final judgment, and the plaintiff therein recovered judgment in action No. 1 on December 13, 1895, against both the defendants for the sum of $7,892.44 damages and interest, and $1,349.38 costs and disbursements, amounting in all to the sum of $9,241.82. This judgment, on appeal, was modified by the appellate division of the supreme court by deducting from the said damages the sum of $1,574.96, and from the said costs the sum of $78.76, making together the sum of $1,653.72, leaving the said judgment in force against both of said defendants for $7,588.12, with interest from December 13, 1895, and as so modified was affirmed on October 2, 1897. On a further appeal to the court of appeals of the State of New York, the said judgment as modified was affirmed without costs, July 16, 1900. Said judgment is now wholly unpaid and is the judgment mentioned in the bill of complaint herein and in the second paragraph of the answer of the defendants Weed, Merchants' National Bank, and Davis as administrator. A separate judgment was also rendered in said action No. 1 against the Anglo-American Provision Company alone for $615.38, which is wholly unpaid and on which interest is due from December 13, 1895.

In the action entitled "Davis Provision Company against Fowler Brothers, Limited, and Anglo-American Provision Company," No. 2, a judgment was rendered by the trial court in favor of plaintiff, but said judgment was wholly reversed by the appellate division of the supreme court of New York (20 Applt. Div., 632), and nothing has been received by reason thereof or of the claims and demands sued on in said action.

The action mentioned in said assignment as pending in the circuit court of the United States for the southern district of New York, entitled "Davis Provision Company against Anderson
66 Fowler," has never been tried and nothing has been received by reason thereof or of the claims and demands sued on therein.

The action referred to in said assignment as brought by Mark J. Davis against Fowler Brothers, Limited, and Anglo-American Provision Company, was prosecuted to judgment, and on December 13, 1895, the plaintiff therein recovered judgment against both said defendants for $5,881.80 damages and interest and $620.70 costs and disbursements, and also a separate judgment against the Anglo-American Provision Company for $611.91 damages and interest. On appeal to the appellate division of the supreme court, this judgment was modified by reducing the separate judgment to $457.37 and interest, and the joint judgment to $1,260.91 and interest from May 9, 1893, and as modified affirmed on October 2, 1897 (20 Applt.

Div., 633). On March 8, 1900, the said judgment, amounting with interest to $3,026.46, was paid.

Fifth. The Davis Provision Company is insolvent and has no substantial assets whatever.

Sixth. In the action brought by the Anglo-American Provision Company against the Davis Provision Company in Illinois, the Davis Company pleaded the general issue and also a plea of set-off, as by reference to the judgment record set forth in the first paragraph of this stipulation will appear. The first item of set-off alleged in said plea, for the amount of the Stockyards Warehouse Company's bills, amounting to $1,288.05, and interest, was one of the claims or demands on which the action brought by Mark J. Davis against Fowler Brothers, Limited, and Anglo-American Provision Company, was based. Said item was one of those for which judgment was originally recovered by the plaintiff in said action, but it was rejected and disallowed by the appellate division of the supreme court on appeal.

The second item in said plea of set-off filed in the Illinois action, for special services of Henry Davis rendered the
67 Anglo-American Provision Company, amounting to $2,500, was the subject of the action brought by Henry Davis against the Anglo-American Provision Company mentioned in "Exhibit A" set forth in the second paragraph hereof. Said action has never been tried and nothing has been recovered by reason thereof.

The third item in said plea of set-off, for loss on 300 tierces of hams, was one of the claims or demands sued on in the action brought by the Davis Provision Company against Fowler Brothers, Limited, and Anglo-American Provision Company, in the supreme court of New York, known as action No. 1, which was one of the actions mentioned in the said assignment to Smith M. Weed. The said claim was allowed in said action for $2,047.40, and the same is included in the judgment which has been recovered by the Davis Provision Company, or its assignee, which judgment is the judgment mentioned in the bill of complaint herein and which it is sought to extinguish by set-off.

The fourth item in said plea of set-off, being for loss on seventy-five tierces shoulders rejected by Hammond & Co., for 497.25, was one of the claims on which the action of the Davis Provision Company against Fowler Brothers, Limited, and Anglo-American Provision Company, numbered one, was brought. This item was allowed by the trial court and went into the judgment in favor of the Davis Company as originally entered, but on appeal to the appellate division, said item was rejected and disallowed.

The plea of set-off interposed in the action brought in Illinois, as above stated, was withdrawn by stipulation on December 27, 1898.

Seventh. Upon the trial of the action brought in the court of New York, and which resulted in the judgment in favor of the Davis Provision Company against complainant and Fowler Brothers,
68 Limited, mentioned in the bill of complaint, the trial court made certain findings of fact in the words and figures following:

"21st. That business between plaintiff and defendants was always "conducted on the part of the defendants in the name of the Anglo- "American Provision Company, and was solely with it until the "formation of Fowler Brothers, Limited, in 1890, and thereafter, al- "though conducted in the name of the Anglo-American Provision "Company, was the business of Fowler Brothers, Limited, or its busi- "ness equally with that of the Anglo-American Provision Company.

"23d. That almost immediately upon the formation of the Davis "Provision Company it commenced doing business with the Anglo- "American Provision Company and continued until 1893, upon the "understanding and agreement before found, the business on the "part of the Anglo-American Provision Company being done under "its own name in Chicago, and under the name of Fowler Brothers "in New York; but subsequent to the formation of Fowler Brothers, "Limited, in 1890, it was done under the name of Fowler Brothers, "Limited, in New York; that from the start the Davis Provision "Company purchased all its supplies from the Anglo-American "Provision Company, except comparatively few purchases of goods "that the Anglo-American Provision Company could not supply."

Eighth. On the appeal to the appellate division of the supreme court of the State of New York, in the action last above mentioned, the opinion of the court contained the words following (see 20 App. Div., 627):

"The defendants, Fowler Brothers, Limited, was organized Sep- "tember, 1890, under the laws of Great Britain, to take over to itself
"the business of the Anglo-American Provision Company,
69 "and of the other like corporations and companies named in
"its charter. It took over to itself the Anglo-American Pro- "vision Company, its capital stock, business and liabilities. It kept "the latter company alive and used its name in most of its business "with plaintiff.

"The Fowler Company, Limited, upon its acquisition of the Anglo- "American Provision Company, thus became the real party in in- "terest in the business thereafter done with the plaintiff, although "the name of the Anglo-American Company was often used."

Ninth. But the Anglo-American Provision Company and Fowler Brothers, Limited, when sued in the courts of New York by the Davis Company, as alleged in the bill of complaint and in the second paragraph of the answer of defendants Weed, Merchants' National Bank and Davis, as administrator, defended the said action on the merits, denying any and all liability for the claims therein made, and did not, nor did either of them, interpose or allege any counter-claim or set-off whatsoever.

Tenth. The defendants, Frank E. Smith, Thomas F. Conway and George S. Weed, are attorneys and counsellors-at-law, and were practicing as such at Plattsburgh, N. Y., from 1890 to 1899, under the firm name of Weed, Smith & Conway. In or about June, 1894, they were retained by the Davis Provision Company to bring, and did bring, various actions against the Anglo-American Provision Company and Fowler Brothers, Limited, being the actions men-

tioned in "Exhibit A," heretofore set forth. That three of said actions were prosecuted to the appellate division of the supreme court, and one to the court of appeals of the State of New York, as stated in the fourth paragraph of this stipulation. That in the course of said actions said attorneys rendered professional services and made disbursements.

70 *Eleventh.* The action brought by the Anglo-American Provision Company against the Davis Provision Company, in Illinois, mentioned in the first paragraph hereof, was begun on November 4, 1893; the action was put at issue by the plea of the defendant on December 8, 1893. On May 5, 1896, a stipulation was made by the respective parties that the case should be passed, to be taken up on ten days' notice, which stipulation was made at the request of the attorneys for the Anglo-American Provision Company. After making this stipulation the action could have been tried at any time on ten days' notice, until the calendar of the court was made up in the following October, but no such notice was given. In April, 1898, the case was dismissed by default. On September 28, 1898, the order of dismissal was vacated by consent of parties and the case restored to the calendar. The condition of the calendar of the circuit court, of Cook county, Illinois, was such during the years 1893 to 1899 that the delay necessarily intervening between the commencement of the action and its being called for trial, was not more than two years, and said cause could have been moved for trial by either party after the expiration of said time.

Twelfth. The rate of interest on judgments fixed by the laws of Illinois is five (5) per cent. per annum.

Thirteenth. This stipulation shall be filed and may be used by either party with the same force and effect as if the facts stated were proved by testimony in the cause.

Dated March —, 1901.

WEISER & BRIDGES,
Solicitors for Complainant.
SMITH, CONWAY & WEED,
Solicitors for Defendants.

71 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY
against
DAVIS PROVISION COMPANY ET AL.

Testimony taken on behalf of the complainant, pursuant to notice, under the 67th rule of the Supreme Court, in equity, before John A. Shields, Esq., standing examiner, at his office in the post-office building, on Wednesday, March 13, 1901, at 11 o'clock a. m.

Appearances—H. W. Bridges, Esq., for the complainant; Frank E. Smith, Esq., for the defendant-.

It is stipulated between counsel for both parties that the deposition be taken by a stenographer, and reduced to typewriting, and then signed by the witness; all objections except as to form of question are reserved for the final hearing.

ANDERSON FOWLER, called and sworn as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. BRIDGES:

1 Q. Mr. Fowler, what is your relation to the Anglo-American Provision Company?

A. President of the company.

2 Q. What was your relation to that company in 1893?

A. President of the company.

3 Q. Did the judgment obtained in Cook county, Illinois, by the Anglo-American Provision Company, against the Davis Pro-
72 vision Company, about January, 1899, arise out of the same transaction as the judgment obtained in New York State by the Davis Provision Company against the Anglo-American Provision Company in December, 1895?

Mr. SMITH: I object to the form of that question, as calling for a mere conclusion of the witness.

Mr. BRIDGES: I thought you were not going to object to questions as to form.

Mr. SMITH: I wish to preserve this objection, the record itself should be the best evidence as to what the cause of action was. This objection is one that I feel I am bound to take now or waive.

Mr. BRIDGES: Do you object to it as leading?

Mr. SMITH: No, sir; not as leading, but because it involves a conclusion which is an inference from the testimony for the court to draw. The question should relate to what the action was for. If it was for the same cause of action, then the examination of the record should disclose it—a comparison of the records.

A. Yes, sir.

4 Q. Was there an open and running account between the Anglo-American Provision Company and the Davis Provision Company, the organization of the Davis Provision Company, up to December, 1892?

A. Yes, sir.

5 Q. Was the Davis Provision Company usually in debt to the Anglo-American Provision Company to the amount of forty thousand to one hundred thousand dollars?

A. Yes, sir.

6 Q. Do you know, in 1893, that the Davis Provision Company were in financial difficulties and had failed to meet some of their notes?

A. Yes, sir.

73 7 Q. Did the judgment which you obtained in Illinois, against the Davis Provision Company, arise in relation to matters pertaining to this running account between you and the Davis Provision Company?

Mr. SMITH: I object to that as leading and calling for the mere conclusion of the witness, and not proper in form.

A. Yes, sir.

8 Q. I will now ask you out of what circumstances did the judgment obtained by the Anglo-American Provision Company against the Davis Provision Company in Illinois, arise?

A. On goods delivered to the Davis Provision Company by the Anglo-American Provision Company; does that answer it?

9 Q. Yes; were these goods delivered between the years 1890 and 1893?

A. To the best of my knowledge and belief, yes.

10 Q. Out of what transaction did the judgment against the Anglo-American Provision Company, obtained by the Davis Provision Company, here in New York State, in 1895, arise?

A. Claims made by the Davis Provision Company, that the goods received were damaged, and were not good; and also through the rehandling of the goods at Jersey City.

11 Q. These were goods that had been sold by the Anglo-American Provision Company to the Davis Provision Company somewhere between the years 1886 and 1892?

A. Yes, sir.

Cross-examination.

By Mr. SMITH:

12 X Q. Do you mean to say, Mr. Fowler, that the claim for damaged goods on which the Davis Company procured its judgment was based on the same goods delivered which formed the subject of your action in Illinois?

A. No, sir.

74 13 X Q. When you say that the Illinois judgment arose out of the same transaction, what do you mean by that, Mr. Fowler?

A. The running account with the Davis Provision Company.

14 X Q. Do you mean that it arose out of the same consignment of goods?

A. No, sir.

15 X Q. The claims which the Davis Provision Company made against your company had been the subject of controversy for some considerable time between you, hadn't they?

A. I believed, and now believe, that Davis was making claims that were unjust.

Mr. SMITH: I move to strike that out.

Mr. BRIDGES: I consent.

16 X Q. 15 X Q. repeated.

A. That is my testimony before.

Mr. SMITH: I make the same motion.

17 X Q. 16 X Q. repeated.

A. Did you say from what time to what time; do you mean from now?

18 X Q. No, sir; the time the suit was brought in 1894, some time previous to that.

A. Mr. Davis was continually making unjust claims.

19 X Q. When these goods that you say were sold and on which your suit in Illinois was brought—when were those goods delivered, do you know?

A. I believe between 1890 and 1893.

20 X Q. How much were delivered in 1890, do you know?

A. No, sir; I do not know that any of them were in 1890; I should think——

Mr. BRIDGES: The bill of particulars would show that.

75 Mr. SMITH: I want to see what is in the mind of the witness.

The WITNESS: I don't believe any was as early as 1890.

21 X Q. 1891?

A. I would not swear to that without going to the books in Chicago and finding out.

22 X Q. Isn't it true at that time, as early as 1890 and 1891, that some of these claims that Mr. Davis subsequently sued your company on, were then made by him?

A. I will have to answer again, he was continually making unjust claims.

23 X Q. Then you did not recognize as valid, any of those claims?

A. No, sir; because they were unjust, and although he has got judgments on them they were unjust.

24 X Q. At the time of the transaction between your two companies which gave rise to the suit in Illinois, you knew that Mr. Davis made claims against your company?

A. Yes, sir.

25 X Q. And you denied their validity—you disputed them?
A. Yes, sir; we told him they were unjust and would not recognize them.
26 X Q. Would not allow them?
A. No, sir.
27 X Q. Do you recall a transaction, Mr. Fowler, with the Davis Provision Company in the summer of 1893, on the board of trade, a purchase of goods—wheat or corn?
A. No, sir.
28 X Q. You had such transactions for the Davis Company, didn't you?
A. I believe there was, but personally I did not transact them.
29 X Q. Your company—and when I say you I mean your company all the time?
A. Yes, sir; I believe there was.
76 30 X Q. You were a director of the Davis Company?
A. I was.
31 X Q. From its organization?
A. I believe so.
32 X Q. That company had an office in the State of New York?
A. In Plattsburg and in Albany for a time.
33 X Q. Most of its business was done at its offices in the State of New York?
A. All the meetings of the directors were held in Chicago.
34 X Q. I mean the ordinary business of the company was transacted mainly from its New York office?
A. That would depend whether you call buying or selling the most.
35 X Q. There were two ends to it?
A. Yes, sir.
36 X Q. But one end was conducted from the New York office?
A. Yes, sir; one in New York and the other in Chicago.
37 X Q. Can you tell me a little more definitely——
A. I must correct myself; I think at the end of the company I was not a director.
38 X Q. Down to 1893 or 1894 you were a director, were you not?
A. I think until 1893; not subsequently.

Mr. BRIDGES: What time in 1893?
Mr. SMITH: I do not recollect the date.
Mr. BRIDGES: Will you please ask him.

39 X Q. What time in 1893 did you cease to be a director?
A. At the time Mr. Weed was elected director.
40 X Q. You cannot fix the date?
A. No, sir.
77 41 X Q. Now, can you tell us a little more definitely what the transaction was on which your Illinois judgment was procured?
A. I cannot tell you the particulars without looking at the accounts.

42 X Q. You say that certain notes of the Davis Company were unpaid in 1893; what notes do you refer to?

A. Notes given by the Davis Provision Company to the Anglo-American Provision Company for goods bought and delivered.

43 X Q. Any others?

A. Not as I know of.

44 X Q. The Anglo-American Provision Company brought suit on those notes in the State of New York, or the Fowler Brothers, Limited?

A. We extended it.

45 X Q. You renewed them?

A. Yes, sir; we renewed notes afterward; on the extended notes we sued.

46 X Q. Do you call that a failure to pay the note at maturity, where you voluntarily renew it?

A. We did not voluntarily renew it; we had to.

47 X Q. Under what compulsion?

A. They did not pay; would not pay.

48 X Q. You renewed the notes?

A. We took other notes of the same company; he stated he would pay these extended notes.

49 X Q. And when those extended notes came due he did not pay them?

A. No, sir.

50 X Q. And you sued?

A. Yes, sir.

51 X Q. Your company sued?

A. Yes, sir.

52 X Q. And got judgment?

A. Yes, sir.

53 X Q. The Davis Company paid the judgment?

A. Somebody paid it.

78 54 X Q. The judgment was paid?

A. Yes, sir.

55 X Q. Within a very few days after it was procured?

A. I think so, but that would not cover all the notes that were extended or that he forfeited.

56 X Q. But all that were due at that time?

A. Yes, sir.

57 X Q. Did any other note come due in 1893 he did not pay?

A. Yes, sir; I believe so.

58 X Q. What became of it?

A. 1893—well, that is a long period; I think they were extended; I cannot tell you without looking at the books.

59 X Q. It was subsequently paid, wasn't it?

A. I think so.

60 X Q. Now, the Davis Provision Company sued the Anglo-American Provision Company in the spring of 1894; you did not hold any unpaid notes of the Davis Provision Company at that time, did you?

A. I don't think so.

It is stipulated that the witness shall sign the stenographer's original notes in the presence of the examiner and the counsel, which he thereupon did.

It is also stipulated that the witness may sign the typewritten copy of his deposition when it is written out, but not in the presence of the examiner.

ANDERSON FOWLER.

Sworn before me this 13th day of March, 1901.
JOHN A. SHIELDS, *Examiner.*

79 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY ET AL., Defendants.

Depositions taken at the office of Weeds, Conway & Cotter, at Plattsburgh, New York, March 1, 1901, before R. E. Healey, Esq., referee, pursuant to the annexed notice.

Appearances.—Plaintiff appears by Mr. H. W. Bridges, their counsel; defendants appear by F. E. Smith, their counsel.

It is stipulated by the counsel for both parties that the depositions be taken by a stenographer, reduced to long hand, and then signed by the witnesses.

All objections as to form of questions reserved to final hearing.

(The objections to the testimony of Davis and Wever hereinafter noted were not taken at the time but were inserted when the papers were printed and are to be be deemed taken on the final hearing, pursuant to above stipulation.)

HENRY DAVIS, being duly sworn as a witness in behalf of the defendants, testified as follows:

Examined by Mr. SMITH:

Q. Where do you reside, Mr. Davis?
A. Plattsburgh, N. Y.
80 Q. You were president of the Davis Provision Company?
A. Yes, sir.
Q. You were such president in 1893?
A. Yes, sir.
Q. And since?
A. Yes, sir.
Q. In 1893, did you make a loan in behalf of your company through the Merchants' National Bank of Plattsburgh of $13,500?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.
Q. What paper or obligation was given for the loan?

Same objections.

A. Three notes.
Q. Who were the parties to those notes?

Same objections and that it is not the best evidence.

A. They were signed by myself and indorsed by Mr Weed, one note, I think, and one note was signed by Mr. Weed and indorsed by me, and were in favor of the Davis Provision Company.
Q. The notes were all payable to the order of the Davis Provision Company?

Same objections.

A. Yes, sir.
Q. What was the third note?
A. The third note was signed by my brother, Julius Davis.
Q. Your brother is dead?
A. Yes, sir.
Q. What was the amount of it?

Same objections.

A. $3,500.
81 Q. What was the amount of the other two notes?

Same objections.

A. $5,000 each.
Q. How did Mr. Weed come to indorse the notes?

Same objections and as calling for conclusions.

A. By my request.
Q. Was it your request personally, or on behalf of the Davis Provision Company?

Same objections.

A. On behalf of the Davis Provision Company.
Q. If I understand you, Mr. Weed indorsed the notes in behalf of the Davis Provision Company?
A. Yes, sir.
Q. Any agreement with Mr. Weed as to security?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.
Q. What was it?
A. First, we gave him the Milling Company stock and the claims of the Davis Provision Company against the Anglo-American Provision Company and Fowler Brothers.
Q. Any agreement in regard to those claims made at that time?
A. Yes, sir.
Q. What was the agreement?

Same objections.

A. The agreement was to give him all the claims the Davis Pro-

vision Company had against the Anglo-American Provision Company and the Fowler Brothers, Limited, to secure those indorsements.

Q. What was done with the proceeds of those notes; to whose credit were they placed?

Same objections.

82 A. It was passed to the credit of the Davis Provision Company?

Q. Where?

A. In Plattsburgh.

Q. What bank?

A. The Merchants' national bank.

Q. What was done with the money?

Same objections.

A. I paid the judgment.

Q. The judgment obtained against the Davis Provision Company by Fowler Brothers, Limited?

A. Yes, sir.

Q. Have any notes been paid?

A. Yes, sir.

Q. Which one?

A. The $3,500 note.

Q. When?

A. It was paid in 1893, or the beginning of 1894.

Q. Has either of the other two notes been paid?

Same objections.

A. No, sir.

Q. Any part of them?

A. No, sir.

Q. There is now due $10,000 and interest?

A. Yes, sir.

Q. You requested Mr. Weed to indorse the notes to enable you to obtain the loan?

Same objections.

A. Yes, sir; to pay that judgment.

Q. You paid that judgment which had been obtained against your company by Fowler Brothers?

A. Yes, sir.

Q. The judgment was how much?

Same objections.

83 A. The judgment was about $19,000 and interest, and something else.

Q. The proceeds of this loan were used with other moneys to pay that judgment?

A. Yes, sir.

Cross-examination.

By Mr. BRIDGES:

Q. How long had you been dealing with Fowler Brothers, Limited, previous to this transaction?

A. Since 1878; I started in 1878.

Q. Since what time were the dealings of the Davis Provision Company in procuring their products for sale confined almost exclusively to Fowler Brothers, Limited, and the Anglo-American Provision Company?

A. We started the Davis Provision Company about 1885 or 1886.

Q. It depended for its products almost exclusively upon Fowler Brothers (Limited) and Anglo-American Provision Company?

A. As a rule.

Q. It did depend on them for its products?

A. It didn't.

Q. You say you had this agreement with Mr. Weed to give him certain collateral on these notes; did you ever reduce it to writing?

A. There was an assignment made to him.

Q. How long afterwards?

A. I could not remember.

Q. Several years afterwards?

A. No, sir.

Q. A few weeks afterwards?

A. I could not remember when it was, it is so long since.

Q. Did the assignment you afterwards made to Mr. Weed contain any mention of the milling company stock?

84 A. Yes, sir.

Q. You did business with Fowler Brothers (Limited) and the Anglo-American Provision Company subsequent to this assignment, which you say took place in 1893?

A. I think one transaction or so.

Q. No more than that?

A. I don't think there was.

By Mr. SMITH:

Q. You said that the milling company stock was assigned by the same instrument; are you sure that it was assigned by the same paper or was there a separate paper?

A. Separate paper.

Q. Did that stock turn out to be of value?

A. No, sir.

Q. The stock of the milling company was worthless?

A. Yes, sir.

Q. It was of value in 1893?

A. Yes, sir.

Q. It was considered rather doubtful at the time?

A. It was simply taken in a nominal way.

Q. Your business relations with Fowler Brothers and the Anglo-

American Provision Company stopped for all practical purposes when Fowler Brothers (Limited) sued your company and got this judgment?

A. Yes, sir.

Q. Did you mean to state, in answer to Mr. Bridges' question, that the business was confined with Fowler Brothers (Limited) and the Anglo-American Provision Company?

A. When we wanted anything which they did not offer I asked them for the money to buy it.

Q. You bought goods from other companies?

A. Yes, sir.

Q. You bought lots of goods from outside dealers?

A. Yes, sir.

85 Q. Your dealings were not confined with Fowler Brothers (Limited) and the Anglo-American Provision Company?

A. No, sir.

Q. You bought and sold articles in which Fowler Brothers and the Anglo-American Provision Company did not deal?

A. Yes, sir.

By Mr. BRIDGES:

Q. In answer to Mr. Smith's question you said that you applied to them for money and bought outside?

A. Yes, sir; I think we did.

Q. Did they advance you money for this purpose?

A. I took a loan.

Q. You always took the loan from Anglo-American Provision Company and Fowler Brothers (Limited)?

A. Yes, sir.

Q. Mr. Davis, it was out of these transactions you had with the Anglo-American Provision Company and Fowler Brothers (Limited), that this Illinois judgment arose?

A. Their judgment?

Q. Yes?

A. Yes; the transactions with them.

Q. How long had the firm of Weeds, Smith & Conway, previous to this assignment which you mention, been your attorneys?

A. I don't know; they have always been our attorneys.

Q. From the institution of the company in 1875?

A. It was not in 1875; it was Palmer, Smith, Weed & Kellogg then, I think.

Q. They were your attorneys?

A. Yes, sir.

Q. Attorneys for the Davis Provision Company?

A. At times; yes, sir.

86 By Mr. SMITH:

Q. Will you look at the copies of notes handed you and say if they are copies of the notes which you gave at the time you obtained the loan of thirteen thousand five hundred dollars?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Mr. Smith offers the copies of notes in evidence.
Received. Marked "Exhibit A."

HENRY DAVIS.

Subscribed and sworn before me this 2d day of March, 1901.
[L. S.] R. E. HEALEY,
Notary Public.

JOHN M. WEVER, being duly sworn as a witness in behalf of the defendant, testified as follows:

Examined by Mr. SMITH:

Q. You reside in Plattsburgh, Mr. Wever?
A. Yes, sir.
Q. Cashier of the Merchants' National Bank of Plattsburgh?
A. Yes, sir.
Q. And have been how long?
A. Since it was organized.
Q. When?
A. 1884.
Q. You know of the Davis Provision Company?
A. Yes, sir.
Q. Was it doing business here in 1893?
A. Yes, sir.
87 Q. You know Henry Davis?
A. Yes, sir.
Q. You know Smith M. Weed?
A. Yes, sir.
Q. Just heard the testimony of Mr. Davis?
A. Yes, sir.
Q. Did your bank make a loan to the Davis Provision Company in 1893?
A. Yes, sir.
Q. October?
A. Yes, sir.
Q. How much?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. $13,500.
Q. State the circumstances?

Same objections.

A. The first I knew of the matter was when Mr. Weed came in the bank and said he wanted to see me; we went in the little room and sat down, and he said he felt uneasy for the Davis Pro-

vision Company and asked me to make them a loan; of course, it was a panic here then and hard work to get money here at any rate; he was very anxious to help Mr. Davis, and finally I made the loan; I told him I would make it provided he would go on the paper.

Q. Was Mr. Davis present at the interview?

A. He was at the last.

Q. To whom was the loan made?

A. Davis Provision Company.

Q. $13,500?

A. Yes, sir.

Q. The proceeds of the note were deposited in your bank to the credit of the Davis Provision Company?

Same objections.

A. Yes, sir.

88 Q. Paid out on draft?

A. Yes, sir; it was to pay that judgment.

(Notes heretofore referred to shown witness.)

Q. Will you look at the copies of the notes and state if they are copies of the notes which you took at that time?

Objected to as incompetent, irrelevant and immaterial, and as not the best evidence.

A. Yes, sir; I am positive they are copies of the notes.

Q. In the negotiations for the making of that loan between yourself, Mr. Davis and Mr. Weed what, if anything, was said touching security to be given Mr. Weed?

Objected to as incompetent, irrelevant and immaterial, as hearsay and not binding on plaintiff.

A. Mr. Weed told me he was to have security and I insisted that he should have security.

Complainant moves to strike out answer as hearsay.

Q. Any mention made of what the security was to be?

Same objections and as hearsay.

A. The milling company stock and the claims against Fowler Brothers and the Anglo-American Provision Company.

Q. You knew of the claims made by the Davis Provision Company?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir; I knew nothing about the details.

Q. You knew that claims were made against them and the amounts?

A. Yes, sir.

Q. As a fact, you knew about the claims?

A. Yes, sir.

Q. They had been discussed?
A. Yes, sir.
89 Q. You knew of the Plattsburgh Milling Company?
A. Yes, sir.
Q. What become of that company?
A. Failed.
Q. How long ago?
A. Five years.
Q. Was there a receiver appointed?
A. Yes, sir.
Q. You were the receiver?
A. Yes, sir.
Q. The property of the company was sold?
A. Yes, sir; it did not realize enough to pay its debts.
Q. The stock of the Plattsburgh Milling Company is absolutely worthless?
A. Worse than worthless.
Q. Any part of that original loan been paid?
A. $3,500.
Q. How much is now due the bank?
A. $10,000.
Q. What is the date of the notes?

Objected to as incompetent, irrelevant and immaterial and as not the best evidence.

A. October 26, 1893.
Q. Who were they made by?

Same objections.

A. Two notes of $5,000 each, one made by Julius Davis and indorsed by Mr. Weed, and the other made by Mr. Weed and indorsed by Henry Davis, and another note for $3,500 made by Henry Davis and indorsed by Mr. Weed.
Q. The notes have been renewed from time to time?
A. Yes, sir.
Q. Are the notes in the present form now due?
A. No, sir.
Q. The bank owns the notes which you have referred to?
A. Yes, sir.
90 Q. And they represent the loan now?

Same objections.

A. Yes, sir.
Q. Who are the parties to the notes in their present form?

Objected to as incompetent, irrelevant and immaterial and not the best evidence.

A. Mr. Weed is maker of one note of $5,000, and indorser upon the other note of $5,000.

Cross-examination.

By Mr. BRIDGES:

Q. When did you first commence to have dealings with the Davis Provision Company?

A. I presume when they first commenced business.

Q. They kept an account with you?

A. Yes, sir; the same as other people.

Q. Were they indebted to you at the time these notes were discounted?

A. Yes, sir; we had their paper.

Q. To what extent?

A. I do not remember.

Q. Could you find out?

A. I suppose I could.

Q. They were in your debt and had been for how long?

A. Yes, sir; they owed and had paper there from time to time; I presume as much as $10,000.

Q. About $10,000 outside of this?

A. It had nothing to do with these transactions; it was outside of this.

Q. They had owed that amount for some time?

A. We always loaned them $10,000.

Q. Their credit was good for that amount up to that time?

91 A. Yes, sir; until they were sued by Fowler Brothers it was good everywhere; Mr. Davis told me when he was sued.

Q. Was Mr. Smith M. Weed trustee for you; do you claim he held these claims of the Davis Provision Company against Fowler Brothers (Limited), and the Anglo-American Provision Company as trustee?

A. He has not under any appointment, that I know of.

Q. Any trust created?

A. I suppose so, morally,

Q. The understanding is that if he collects the amount of the claims, he is to turn over the money to you?

A. He insisted that he would have security and I said he should have security at the time the loan was made; Mr. Weed was never formally appointed trustee so far as I know, he may have been.

By Mr. SMITH:

Q. You say that when this loan was made you insisted that he should have security?

A. Yes, sir.

Q. You understood that he was to have security?

A. Yes, sir.

Q. It was understood that he was to have security or the loan would not be made?

A. Yes, sir.

Q. You knew what the security was?

A. Yes, sir; the milling company stock and the claims against the Fowler Brothers and Anglo-American Provision Company.

By Mr. BRIDGES:

Q. Did you consider that very valuable security?
A. I did; and I believe if they had got it into that suit the Fowlers would not have got a judgment; I was satisfied that it was good.
92 Q. And still at the same time this security was taken it was considered as matters in litigation and not security at all?
A. Not necessarily; no.
Q. You knew that Mr. Weed wasn't getting any notes or mortgages?
A. I thought Mr. Davis's claims were important, but was not as good as a mortgage or note, for that you can use.
Q. You thought it was as good as a mortgage or note?
A. No, sir.
Q. Did you know that the claims were for bad and damaged meats?
A. I think I did afterwards.
Q. Did they tell you the nature of the security?
A. Mr. Weed never told me the nature of the security; he didn't know the nature of the security, I presume.
Q. What did you think he was getting if he didn't go into the nature of the security?
A. He told me it was a claim against the Anglo-American Provision Company and Fowler Brothers (Limited).
Q. He didn't state what the claim was for?
A. He said it was a good claim and could be collected.

By Mr. SMITH:

Q. You knew the nature of the claim?
A. In a way I did.
Q. You knew about the dealings?
A. I knew there were claims.

By Mr. BRIDGES:

Q. What the claim was for you cannot recall?
A. I do not remember in detail; I cannot tell the whole of the items making up the claim.

JOHN M. WEVER.

Subscribed and sworn to before me March 1, 1901.
[L. S.] R. E. HEALEY,
Notary Public.

93 EXHIBIT A.

PLATTSBURGH, N. Y., *Oct.* 26, 1893.

Three months after date I promise to pay to the order of Davis Provision Co. five thousand 00/100 dollars at N. Y. nat'l exch. bank. Value received.

$5,000 00/100.

(Signed) JULIUS DAVIS.

Indorsed.

(Signed) Davis Provision Co.
(Signed) S. M. Weed (Signed) H. Davis.

PLATTSBURGH, N. Y., *Oct.* 26, 1893.

Two months after date I promise to pay to the order of Davis Provision Co. thirty-five hundred 00/100 dollars at N. Y. national exchange bank, N. Y. Value received.

$3,500 00/100.

(Signed) H. DAVIS.

Indorsed.

(Signed) Davis Provision Co.
(Signed) S. M. Weed.

PLATTSBURGH, N. Y., *Oct.* 26, 1893.

Four months after date I promise to pay to order of Davis Provision Co. five thousand 00/100 dollars at N. Y. nat'l exch. bank. Value received.

$5,000 00/100.

(Signed) S. M. WEED.

Indorsed.

(Signed) Davis Provision Co. (Signed) H. Davis.

94 EXHIBIT B.

United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank, Henry Davis, as Administrator of Julius Davis, Deceased, and American Surety Company.

Notice of Taking Depositions de bene esse.

SIRS: You will please take notice that the depositions of John M. Wever, cashier of the Merchants' National Bank of Plattsburgh, N. Y.; Albert Guibord, president of the Merchants' National Bank

of Plattsburgh, N. Y.; Henry Davis and Smith M. Weed, all of whom reside at Plattsburgh, N. Y., and more than one hundred miles from the place of trial of this cause, will be taken as witnesses, pursuant to the provisions of sections 863, 864 and 861 of the Revised Statutes, on behalf of the defendants herein, before Robert E. Healey, notary public, who is not of counsel or attorney for any of the parties, nor interested in the event of the cause, at the office of Weeds, Conway & Cotter, in the village of Plattsburgh, N. Y., on
95 Saturday, the 23d day of February, 1901, at 10 o'clock in the forenoon.

Dated February 18, 1901.

Yours, etc., SMITH, CONWAY & WEED,
Solicitors for Defendants, 21 *Courtlandt Street*,
New York City.

To Messrs. Weiser & Bridges, solicitors for complainant, 35 William street, New York.

Certificate.

Circuit Court of the United States, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY ET AL., Defendants.

UNITED STATES OF AMERICA,
State of New York, Northern District of New York, } ss:
County of Clinton,

I, Robert E. Healey, notary public in and for the State of New York, county of Clinton, in the northern district of New York, duly appointed, commissioned and qualified, do hereby certify,
96 that the foregoing depositions, consisting of fourteen pages, numbered in the margin from one to fourteen inclusive, were taken before me as such notary, at the office of Weeds, Conway & Cotter, in the village of Plattsburgh, in the county of Clinton, and State of New York, on the 1st day of March, 1901, at 4 o'clock in the afternoon, under and in pursuance of the notice hereto annexed, marked "Exhibit B." That the witnesses named in the said depositions, to wit: Henry Davis and John M. Wever were examined in my presence and by counsel for the respective parties. The plaintiff being represented by Mr. H. W. Bridges as counsel, and the defendant by Mr. F. E. Smith.

I further certify, that the said witnesses, and each of them before testifying, were cautioned and sworn by me to testify the whole truth and were cross examined. That the testimony of each of said witnesses was reduced to writing by a stenographer, pursuant to a stipulation of the respective counsel, made in my presence, and after being written out was read over to, carefully examined by and subscribed by each of the said witnesses in my presence.

I further certify, that the reason why said depositions of said witnesses have been so taken is, that they and each of them live at a greater distance than one hundred miles from the place of trial of this action, to wit: at the village of Plattsburgh, in the State of New York.

[L. S.]

R. E. HEALEY,
Notary Public, Clinton Co., N. Y.

97 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY
against
DAVIS PROVISION COMPANY ET AL.

Testimony taken on behalf of the defendants, pursuant to notice, under the 67th rule of the supreme court in equity, before John A. Shields, Esq., standing examiner, at the office of Smith, Conway and Weed, No. 21 Courtlandt street, New York city, on Friday, March 15, 1901, at 2 o'clock p. m.

Appearances: H. W. Bridges, Esq., for the complainant; F. E. Smith, Esq., for the defendants.

SMITH M. WEED, called as a witness on behalf of the defendants and duly sworn, testified as follows:

Direct examination.

By Mr. SMITH:

1 Q. You reside at Plattsburgh, Mr. Weed?
A. Yes, sir.
2 Q. You know the Davis Provision Company?
A. Yes.
3 Q. You have known it for how long?
A. Substantially since it was organized.
4 Q. That was when?
A. Some years prior to 1893.
5 Q. Who was the president of the company in 1893?
A. Henry Davis.
6 Q. Do you remember the circumstance of a judgment being obtained against that company in 1893?

98 Mr. BRIDGES: I object to that as incompetent, irrelevant and immaterial, not the best evidence, and having no bearing on the issues in this action.

A. I do.
7 Q. By whom was that judgment procured?
A. It was procured by Fowler Brothers (Limited).
8 Q. Do you remember the amount of the judgment, approximately?

Mr. BRIDGES: I object to the question as incompetent, immaterial and irrelevant, as having no bearing on the issues in this action.

A. As I recollect it, somewhere about $19,000.

9 Q. Was any application made by the Davis Company to you to aid that company in procuring a loan in relation to that judgment?

Same objection by Mr. Bridges.

A. There was.

10 Q. What was that application?

It is understood that Mr. Bridges' objection to these questions being incompetent, immaterial and irrelevant and not the best evidence applies to all similar testimony.

A. The application was for me to help Henry Davis, the president of the company, to raise the money to pay the judgment.

11 Q. How was it contemplated the money should be raised?

A. I don't recollect exactly how the balance was raised, but $13,500 was raised by a loan from the Merchants' national bank.

12 Q. What paper was given to the bank as evidence of that loan, if any?

A. It was paper; I signed one note, Henry Davis signed another, and I think either Mrs. Henry Davis or Julius Davis signed
99 another; the notes I didn't sign I indorsed after the Davis Provision Company indorsed them, and the others indorsed the notes they didn't sign.

13 Q. You were maker on some and indorser on the others?

A. Yes.

14 Q. Those notes were made for the accommodation of the Davis Provision Company?

A. They were.

15 Q. What arrangement was had between yourself, if any, and the Davis Provision Company, in regard to your making the notes for its accommodation?

Mr. BRIDGES: Same objection.

A. The Davis Provision Company agreed if I would aid them by indorsement to get this money that they would assign to me a certain amount of stock in the Plattsburgh Milling Company and the claims they had against Fowler Brothers and the Anglo-American Provision Company.

16 Q. What, in a general way, were those claims?

A. They were claims the Davis Provision Company claimed against the Anglo American and Fowler Brothers (Limited) growing out of previous transactions.

17 Q. You had known of the existence of those claims for some time?

A. Yes; I had known of them.

18 Q. About how much did those claims amount to?

A. As I recollect it, in the neighborhood of $30,000.

19 Q. Was there a formal written assignment made to you of those claims?

A. I can't recollect whether there was or whether there was not at the time.

20 Q. Was there ever a formal assignment?

A. Yes.

It is admitted by counsel for the complainant that the paper produced bears the genuine signature of the Davis Provision
100 Company, by Henry Davis, president; that it bears the corporate seal of the Davis Provision Company.

Paper offered in evidence and marked "Exhibit A" of this day (March 15, 1901).

(This paper is printed as part of the stipulation, *ante* p. 59.)

Mr. BRIDGES: I object to it as incompetent, irrelevant and immaterial, and is not sufficient to prove the authorization of the board of directors of the Davis Company of the attachment of the signature and seal.

21 Q. Mr. Weed, was there a meeting of the board of directors of the Davis Provision Company held shortly before this paper produced was executed?

Mr. BRIDGES: I object as incompetent, immaterial and not the best evidence.

A. There was a meeting held prior to the execution of this paper.

22 Q. About how long prior?

A. I can't tell how long; within a short time, I should say.

23 Q. Who were present?

A. My recollection is that Henry Davis and myself were present, and Mr. Booth acknowledged by wire the notice.

24 Q. Who were the directors of the Davis Company at that time?

A. Henry Davis, Mr. Booth and myself.

25 Q. This meeting you refer to, where was it held?

A. Held at Plattsburgh, as I recollect it, and I think in the Davis Provision Company office—I can't tell whether it was in Weeds, Smith & Conway's office, or the Davis Provision Company office.

26 Q. Do you recollect whether any communication was presented at that meeting from Mr. Booth?

A. Yes; there was.

101 27 Q. What was it?

A. A telegram admitting notice of the meeting, and——

Mr. BRIDGES: I object as incompetent, irrelevant and immaterial, and ask to have the answer stricken out as not the best evidence; telegram the best evidence.

28 Q. Was any action taken at that meeting with reference to the assignment of the claims of the Davis Provision Company to you?

A. A resolution was passed directing Henry Davis, as president, to make the transfer to me of those claims as agreed when I endorsed the notes.

Mr. BRIDGES. I object and ask that the testimony be stricken out as not the best proof and ask that the minutes of the meeting be produced.

29 Q. You say that the notes which you made and indorsed amounted to $13,500?

A. $13,500.

30 Q. Have you, since those notes were made, indorsed for renewal, or renewed, similar notes in whole or part?

A. My recollection is that $3,500 were paid soon after, and the other $10,000 renewed from time to time since and are now outstanding.

Cross-examination.

By Mr. BRIDGES:

31 X Q. Mr. Weed, this meeting of the board of directors of which you speak was held over five years ago, was it not?

A. Yes, more than five years ago.

32 X Q. You recollection is not very distinct as to what occurred at that meeting?

A. Not as to the details.

33 X Q. Did the Davis Provision Company have a constitution and by-laws?

A. Yes.

102 34 X Q. Had a secretary, too, did it not?

A. Yes; I don't know whether it did just then or not?

35 X Q. It was one of the rules of the Davis Provision Company, was it not, that the secretary should keep minutes of the directors' meetings?

A. Well, that some secretary should.

36 X Q. You were a director and vice-president of the Davis Company, were you not, from June 7, 1893, down to the time of its dissolution?

A. I was a director and, I think, vice-president—I will not be certain—from 1893 down to the time of the assignment; so far as I know I was vice-president.

37 X Q. You attended a meeting of the Davis Provision Company in Chicago on the 2d of December, 1893, did you not?

A. I remember attending a meeting in Chicago, but I don't remember when.

38 X Q. I show you the case on appeal of the Davis Provision Company against Fowler Brothers, Limited, and the Anglo-American Provision Company, at page 521, where it says, "A meeting of the board of directors of the Davis Provision Company, held this second day of December, 1893, at room 60, Board of Trade building, Chicago, Illinois. Present—All the directors, Messrs. Henry Davis, Smith M. Weed and Robert Stobo," and ask if you did not attend that meeting?

A. I remember attending there and I think that is the date; I have no recollection that that is the date.

39 X Q. You would naturally suppose from the record here that this was the date, would you not?

A. I would naturally suppose so.

40 X Q. I will ask you if you did not at that meeting offer the following resolution—I now read from the record on appeal in the case of the Davis Provision Company against Fowler Brothers, Limited, and Anglo-American Provision Company (p. 525): "Mr. Weed now offered the following resolution, which was duly seconded:

Resolved, that all matters relating to any and all claims, dis-
103 putes, settlements and litigation between this company and the Anglo-American Provision Company, Fowler Brothers or Anderson Fowler, and everything connected therewith, be and the same hereby is referred to the president and the vice-president, with full power and authority"?

A. Yes; I think I remember it; that is my recollection.

41 X Q. The resolution was carried and entered on the minutes of the Davis Company, was it not—that resolution offered by you?

A. I would think so.

42 X Q. You were afterward a member of the executive committee of the Davis Provision Company, were you not?

A. Well, I won't be certain about that, but I am inclined to think so.

43 X Q. I refresh your recollection by showing you page 527 of the same case and ask you to read that.

A. (After reading same.) I haven't any doubt I was.

44 X Q. And this committee consisted of two members, Mr. Davis, as president, and yourself, as vice-president, did it not?

A. The record so says; I don't know that I have a personal recollection of it.

45 X Q. When was the receiver appointed for the Davis Company?

A. That I am unable to say, sir.

46 X Q. Do you know who the receiver was?

A. Judging from recollection—my recollection is that there were two receivers, David F. Dobie and John M. Wever; I may be mistaken; that is my recollection.

47 X Q. Were there schedules filed in Plattsburgh?

A. I don't know that.

48 X Q. There was an order of the court of Clinton county appointing these receivers, was there not?

A. I don't know that.

49 X Q. Do you know whether these claims against Fowler
104 Brothers, Limited, and the Anglo-American Provision Company were mentioned in the schedules filed by the receivers?

A. I don't know whether they were or not.

50 X Q. Do you know what the liabilities of the Davis Provision Company were?

A. I don't.

51 X Q. Do you know what its assets were?

A. Not now; I don't remember.

52 X Q. Previous to 1893 the Davis Company did a very large business, did it not?

A. I don't know as you would call it a very large business.

53 X Q. Did a business of over a million dollars a year, didn't it, net?

A. My recollection is that it did one year; still, I would not be certain about it.

54 X Q. Subsequent to that time, when they severed friendly business relations with the Anglo-American Provision Company and Fowler Brothers, Limited, their business amounted to comparatively little, did it not?

A. After the judgment and row with the Anglo-American their business was very much injured and wasn't nearly as large in volume.

55 X Q. If their affairs had been settled up at any time subsequent to that, considering their indebtedness to the bank and indebtedness on notes, they would not be able to meet their liabilities?

A. The president, who was familiar with it, claimed they would be if they got what was due them from the Anglo-American and others; I don't know the details.

56 X Q. Do you know if the Davis Company is indebted to the Plattsburgh banks aside from the notes you indorsed?

A. I don't know anything about it; I don't think it is.

57 X Q. In the year 1893 your law firm was Weeds, Smith & Conway, wasn't it?

A. Nominally it was; actually I had nothing to do with it.

105 58 X Q. You appeared on the letterheads and the insignia of that firm?

A. Yes.

59 X Q. You appeared as the senior member of that firm?

A. My name appeared.

60 X Q. Either as senior member or counsel?

A. It appeared on the paper—I don't know as I should say as either one or the other.

61 X Q. Mr. Weed, do you remember anything about the circumstances surrounding the actual delivery of this assignment which has been offered in evidence here?

A. Without saying so positively, my judgment is that it was handed to me by Henry Davis at the time of its execution; I think I recollect that.

62 X Q. Where was it handed to you?

A. I think it was in the office of Weeds, Smith & Conway; it was an important matter to me.

63 X Q. Do you remember if this was immediately previous to their assignment this was handed to you?

A. No.

64 X Q. It was immediately previous to the application for the appointment of receiver, was it?

A. It doesn't strike me as so; I don't remember.

65 X Q. Was it handed to you exactly in the same condition it is now?

A. So far as I know it was; I think so.

66 X Q. You don't recall whether the date was written in afterwards or not?

A. No; the date was written in at the time it was delivered; there was not any date there at the time and the date was written in.

67 X Q. In whose handwriting is that?

A. Mr. Conway's.

68 X Q. The rest of the instrument is a typewritten instrument?

A. Yes.

69 X Q. The expression "Dated May 27, 1895," is written in in ink?

106 A. Yes.

70 X Q. You never had this acknowledged in any way, did you?

A. I don't remember; I don't see any acknowledgment on it.

It is agreed that the assignment to Mr. Weed produced and offered in evidence may be acknowledged or proved by Henry Davis in the ordinary form of the proof of a corporate instrument, and the instrument deemed reoffered in evidence as then acknowledged or proved.

Mr. Davis is also to be asked whether he can produce the minutes of the corporation authorizing his signature to the said instrument, and, if possible, such minutes are to be produced.

Mr. SMITH: I offer in evidence the judgment-roll in the action of the Davis Provision Company against the Anglo-American Provision Company and Fowler Brothers (Limited), being the judgment mentioned in the complaint in this suit.

Mr. BRIDGES: I object to the whole thing as incompetent and irregular.

Marked "Exhibit B."

Re-direct examination.

By Mr. SMITH:

71 Q. State, if you please, what your relations were with Weeds, Smith & Conway?

A. I have had no interest in the firm since 1883; have not practiced law since then, and have no interest in the firm except that my son is there and I allow the use of my name.

SMITH M. WEED.

Subscribed and sworn to before me this 18th day of March, 1901.

JOHN A. SHIELDS, *Examiner.*

107 THOMAS F. CONWAY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

1 Q. You are an attorney and counselor at law?
A. Yes.
2 Q. Are a member of the firm of Weeds, Smith & Conway, at Plattsburgh?
A. Yes.
3 Q. You were counsel for the Davis Provision Company in certain actions brought by it against the Anglo-American Provision Company and Fowler Brothers (Limited)?
A. Yes.
4 Q. When were those actions brought?
A. The exact date I don't remember; it was in 1894.
5 Q. How many actions were there?
A. Five or six; I think six.
6 Q. Were they all tried?
A. Three of them were tried; the others were not.
7 Q. State in a general way the nature of the actions that were tried?
A. Two of them were actions brought by the Davis Provision Company, a corporation, against Fowler Brothers (Limited), and the Anglo-American Provision Company, corporation, to recover for a large amount of claims made by the Davis Provision Company for damages growing out of a dealing between the Davis Company and the Anglo-American Provision Company and Fowler Brothers (Limited), running over a considerable period of years, in which it was claimed by the Davis Provision Company that it had purchased large amounts of provisions, mostly, if not entirely, meats of various kinds, and I think some grain, of the Anglo-American and Fowler Brothers (Limited); that although these goods were purchased as of first-class quality, they, in fact, when shipped to the various customers of the Davis Provision Company turned out to be bad and unsound and were often rejected.

108 Mr. BRIDGES: I object to the question as incompetent and irrelevant and not the best evidence.

WITNESS (continuing): It was claimed by the Davis Provision Company that large damages accrued in its favor.
8 Q. The suits were tried before a referee?
A. They were.
9 Q. You tried them?
A. Yes; principally, in connection with yourself.
10 Q. Was the testimony voluminous?
A. Very voluminous.
11 Q. Judgments were rendered in three actions in favor of the Davis Provision Company?
A. They were.
12 Q. The defendants appealed to the appellate division?

A. They did; also to the court of appeals in two suits; the record on appeal was 736 pages in one case and 700 in the other.

13 Q. What would you say as to the labor involved in the trial of these actions and services on appeal?

A. The labor on the trial and preceding it consumed a great deal of time and was very difficult.

14 Q. Appeal was taken to the court of appeals?

A. Yes.

15 Q. The suits were removed at one time to the circuit court of the United States and subsequently remanded to the State court?

A. Yes, sir.

16 Q. What, in your judgment, were the services performed reasonably worth, including all services?

A. I wish to say the preliminary work and preparation for trial, to which I personally devoted most of the time, involved the examination of accounts, invoices, account books necessarily in the preparation of the case, which included dealings aggregating millions of dollars a year, and my recollection is that I personally spent,
109 either in my office upon such books and accounts, or in the office of the Davis Provision Company, in the examination thereof and preparation for trial, in the neighborhood of six weeks before the cases were noticed for trial; and my recollection is that the actual trial consumed in the neighborhood of forty days; I think there were forty hearings—about that.

17 Q. What, in your opinion, are the services you describe reasonably worth?

A. My judgment is that the services of plaintiff's attorneys in those various litigations, including the Mark Davis suit, about which you have not inquired, which was of similar nature, and was one of the three cases tried, would be worth at least $7,500.

18 Q. One of the actions to which you have referred was brought in the name of Mark Davis—assigned to him by the Davis Provision Company?

A. Yes; as to a part of the claims.

19 Q. In connection with those litigations did the firm incur disbursements?

A. Yes; to a considerable amount; the exact amount I don't recall.

19 Q. Has any part of the claim for services or disbursements been paid by the Davis Company?

A. There was a small payment, I think, to apply on services in all the litigations, but my recollection is that that did not fully cover the disbursements down to date.

20 Q. Nothing has been paid on account of services?

A. I believe not; no, sir.

21 Q. You claim a lien on the judgments procured to secure your services?

A. The firm of Weeds, Smith & Conway claims such a lien.

22 Q. Will you look at the assignment or paper now shown you (being Exhibit A of this date); have you ever seen that before?

A. I have—I dictated it.
110 23 Q. You prepared it?
A. Yes, sir.
24 Q. Is any part of it in your handwriting?
A. Yes; the date at the end in ink is in my handwriting—"Dated May 27, 1895."
25 Q. Do you recall the date of the paper?
A. Yes.
26 Q. Was it delivered on that day to Mr. Weed?
A. Yes, sir.
27 Q. Did you have anything to do with procuring the appointment of receivers of the Davis Company?
A. Our firm did.
28 Q. What day were the receivers of that company appointed?
A. On the same day that paper was executed, if I remember rightly—May 27, 1895.
29 Q. Was that paper executed and delivered before the appointment of the receivers?
A. It was.

Cross-examination.

By Mr. BRIDGES:

30 X Q. Mr. Conway, when you say your services were reasonably worth this amount, you include everything you have done in this Davis litigation, do you not; that is, in the five or six different actions?
A. No; my idea would be for services in the three suits that were tried; nothing was done but draw the pleadings in the others.
31 X Q. You have received from Fowler Brothers (Limited), on one judgment, $3,026.46?
A. Our firm has received it.
32 X Q. Have you applied it on your lien?
A. We have not.
33 X Q. Have you turned it over to the parties?
A. No; and neither have we turned it over to Weeds, Smith & Conway.
111 34 — Q. You are holding it to abide the result of this action?
A. Yes, sir.
35 X Q. Mr. Conway, did you personally deliver that assignment to Mr. Weed?
A. I don't remember whether I handed it to him or whether Davis, the president of the company, did; it was done at my table and in my room.
36 X Q. Where?
A. At Plattsburgh, in my office.
37 X Q. Do you remember what time of the day it was, or don't you recall that?
A. Yes; it was early in the forenoon.

Re-direct examination.

By Mr. SMITH:

38 Q. After that paper was executed, was your firm directed by Mr. Weed or the Merchants' bank to continue the prosecution of the suits?

A. My firm was; yes, sir.

Hearing adjourned to Thursday, March 21, 1901, at 2 o'clock p. m.

THOMAS F. CONWAY.

Subscribed and sworn to before me this 19th day of March, 1901.

JOHN A. SHIELDS, *Examiner.*

112 Hearing of March 21, 1901, at the office of Smith, Conway & Weed, No. 21 Courtlandt street, New York city, before John A. Shields, Esq., standing examiner.

Appearances: H. W. Bridges, Esq., for the complainant; F. E. Smith, Esq., for the defendants.

ROBERT STOBO, called as a witness on behalf of the defendants and duly sworn, testified as follows:

Direct examination.

By Mr. SMITH:

1 Q. You reside in New York city?

A. Yes, sir.

2 Q. You formerly resided in Chicago?

A. Yes, sir.

3 Q. Were you formerly connected with the Davis Provision Company?

A. Yes.

4 Q. In what capacity?

A. I was secretary and director, I think.

5 Q. From what time?

A. I could not tell—it was so long ago.

6 Q. From about its organization?

A. I think shortly after.

7 Q. When did you cease to be connected with it?

A. I think it was in 1893.

8 Q. Were you then secretary of the company?

A. Yes.

9 Q. Will you look at the book I now show you and say whether or not that is the record book of the Davis Provision Company?

A. Yes; that is it.

10 Q. Those minutes signed "Robert Stobo, secretary," are signed in your handwriting?

A. Yes, sir.

11 Q. Does that book contain the by-laws of the Davis Provision Company?

A. Yes; it does.

113 12 Q. On what pages?

A. From page 7 to page 12, inclusive.

Mr. SMITH: I offer in evidence the by-laws of the Davis Provision Company.

Marked "Def'ts' Ex. 1, March 21, 1901."

Mr. BRIDGES: I ask to have a chance to look through the minutes and reserve the right of objection.

13 Q. Won't you look at page 53 of the book and see if that is the record of the stockholders' meeting in 1893?

A. Yes; that is the record of the adjourned annual meeting of the stockholders in 1893.

Mr. SMITH: I offer that record in evidence (page 53 of the record book).

Marked "Def'ts' Ex. 2, March 21, 1901."

Mr. BRIDGES: I object to it as immaterial and irrelevant.

14 Q. Was there a meeting of the directors of the company held shortly after that adjourned annual meeting?

A. I could not say as to that.

15 Q. Look at the book, page 55, and say if that is the record of the meeting of the directors held June 7, 1893?

A. (After examining book.) Yes; that is the record of the adjourned annual meeting of the directors, held June 7, 1893.

Mr. SMITH: I offer in evidence page 55 of the record (being record of meeting of June 7, 1893), in evidence.

Marked "Def'ts' Ex. 3, March 21, 1901."

Mr. BRIDGES: I object to it as irrelevant and immaterial.

Objection withdrawn.

114 16 Q. Is there any record in this book of any meeting subsequent to June 7, 1893?

A. No; there is none.

17 Q. Do you recall any meeting of the directors of the company subsequent to June 7, 1893, which you attended?

Mr. BRIDGES: I object to that as incompetent, immaterial and irrelevant and not proper evidence.

A. There was a meeting in Chicago.

18 Q. Can you recall about when it was?

A. I could not really say what time it was.

19 Q. What year was it?

A. It might be 1894; I am not sure.

20 Q. When did you cease to be a director of the Davis Provision Company?

A. About 1893 or 1894; I am not sure what time.

21 Q. How did you cease to be secretary?

A. I was removed.

22 Q. By whom?
A. At a meeting of the directors.
23 Q. You were present at the meeting?
A. I was present at the meeting, but did not agree to it.
24 Q. You were present?
A. I was present when the meeting began.
25 Q. You were not present during the whole meeting?
A. No; I left.

Mr. BRIDGES: I object to this.

26 Q. What did you do with the record book?
A. I put it in my desk.
27 Q. Locked it in your desk?
A. Yes, sir.
28 Q. Did you retain possession of the record book during all this time?
A. Yes, sir.
29 Q. Until when?
A. Until I got an order from the court to turn it over to my successor.
115 30 Q. That was how long?
A. I could not say; some months.
31 Q. Then turned it over to your successor?
A. Yes.
32 Q. Have you acted as a director of the Davis Provision Company since that meeting?
A. No, sir.
33 Q. What was the course of business of the Davis Provision Company as regards the business conducted in New York, Albany and Plattsburgh?
A. Mr. Davis had charge.
34 Q. He was president and general manager?
A. He was.
35 Q. What can you say as to the holding of regular meetings by the directors; were they held regularly?
A. No; they were not held regularly.
36 Q. Long intervals would elapse between?
A. Yes.
37 Q. How was the business in New York, Albany and Plattsburgh managed?
A. It was managed by Mr. Henry Davis—conducted a general provision business; he did all the buying, selling and financing and attended to the general business.
38 Q. Everything that was done by the Davis Company Henry Davis did?
A. Yes, sir.
39 Q. Was it the practice for him to carry on, as president, the finances of the company?
A. Yes, sir.
40 Q. Did he borrow money?

A. I think he did

41 Q. Did he give security?

A. I understood he did; that was the general course of the trade.

116 Cross examination.

By Mr. BRIDGES:

42 X Q. Who was your successor in office, Mr. Stobo?

A. I don't remember his name; it was a strange kind of a German name; I don't remember.

43 X Q. Was it Mr. Freiberger?

A. I think that was the name.

44 X Q. He was a Chicago man?

A. I think he was a Chicago man.

45 X Q. You didn't keep those minutes more than two or three months after you were removed, did you?

A. I think it was some months; I don't know how long.

46 X Q. How long?

A. I should judge about three or four months.

47 X Q. You say Mr. Henry Davis attended absolutely to the supervision of the business?

A. Yes.

48 X Q. There were very few meetings of the board of directors?

A. Not many; according to the by-laws there were not regular meetings.

49 X Q. You don't know much how the business was conducted?

A. I know a good deal about it.

50 X Q. From the nature of the Davis Provision Company, did you superintend Mr. Henry Davis's accounts in any way; did you watch how he was doing business?

A. I used to see their accounts sometimes and hear about them from him.

51 X Q. Aside from what he told you, you don't know?

A. I did not examine his books.

52 X Q. You depended on what he told you as to what was done?

A. Yes.

ROBERT STOBO.

Subscribed and sworn to before me this 11th day of April, 1901.

JOHN A. SHIELDS, *Examiner.*

117 Mr. SMITH: I offer in evidence the minutes of the meeting of the board of directors, held December 2, 1893, being pages 521 to 528 of the printed record of the former case on appeal.

Marked "Def't's Ex. 4, March 21, 1901."

Mr. SMITH: I also offer in evidence the charter of the Davis Provision Company and its license to do business in the State of New York.

Marked "Def't's Ex. No. 5, March 21, 1901."

Mr. BRIDGES: I reserve my right to object.

Mr. SMITH: I again offer in evidence the assignment of the Davis Provision Company to Smith M. Weed, which, pursuant to the agreement had at the last hearing, has been acknowledged and proved by Mr. Henry Davis and acknowledged by Mark J. Davis, and in the certificate of proof taken to the acknowledgment of Henry Davis is included the answer to the question to be put to Henry Davis.

Mr. BRIDGES: I object to it as incompetent, irrelevant and immaterial and not sufficiently proved.

Counsel for complainant, then, in rebuttal, offered in evidence a certified copy of the bill of complaint filed in the circuit court of the United States for the northern district of Illinois on May 27, 1895, by Smith M. Weed against the Davis Provision Company, praying for the appointment of a receiver of the Davis Provision Company, and the papers attached to and filed therewith, and also the report of the Chicago Title and Trust Company as receiver of the Davis Provision Company, filed in said court September 7, 1895, together with a portion of Exhibit B attached to said report.

It was admitted by counsel for the defendants that there is nothing in that portion of the receiver's report and schedules attached which has been omitted which relates in any way to the suits or claims,
mentioned in said report, of the Davis Provision Company
118 against Fowler Brothers, Limited, and the Anglo-American Provision Company or against Anderson Fowler.

Counsel for defendants objected to the report of the Chicago Title and Trust Company and the papers attached thereto on the grounds:

First. That the same is incompetent and immaterial; that the acts and declarations of the Chicago Title and Trust Company or of David F. Dobie and John M. Wever, as receivers of the Davis Provision Company, are not admissible in evidence against these defendants, or either of them.

Second. That such declarations and statements are hearsay, being the unsworn statement- of the persons making them.

Third. That the said declarations and statements were made long after the acts and transactions took place which are the subject matter of this suit and that the same are incompetent to characterize or vary them.

Counsel for defendant Weed made the same objections separately on behalf of said defendant, and now moves to strike out the report of the receiver and papers attached thereto upon each and all of the grounds specified in the preceding objection.

Marked "Complainant's No. 1."

Counsel for defendants admitted that the receivers of the Davis Provision Company appointed in the State of New York have not filed any statement of the assets or liabilities of the said company.

Counsel for the complainant further offers in rebuttal the following extracts from the record on appeal in the case of Mark J. Davis against Fowler Brothers, Ltd., and Anglo-American Provision Company:

1st. The tenth allegation of the complaint of the plaintiff,
119 subscribed and sworn to by the said Mark J. Davis on the 18th day of June, 1894, which said allegation is as follows: "That prior to the commencement of this action said Davis Provision Company, for a good and valuable consideration to it paid by plaintiff and by it received, duly assigned and transferred to plaintiff, who resides at Plattsburgh, Clinton county, New York, the cause or causes of action hereinbefore stated and its claims for damages and the items thereof against said defendants, and thereupon plaintiff became and now is the owner and holder thereof."

2d. Counsel for complainant also offers in evidence the 100th finding of fact in the referee's report in said action, which said referee's report is dated the 9th day of December, 1895. It is as follows: "That before the commencement of this action the claims and causes of action set forth in the complaint were assigned and transferred by the Davis Provision Company to the plaintiff in the above-entitled action, Mark J. Davis, and he thereupon became and still is the owner and holder thereof."

3d. Counsel for the complain-t further offers in evidence extract from the minutes of said case, being the testimony of Henry Davis, president of the Davis Provision Company, as follows: "The claims mentioned in this case were assigned to Mark J. Davis by the Davis Provision Company before the suit was started." This testimony was given subsequent to the 20th day of February, 1895.

It is admitted by the parties that the portions offered in evidence are correct extracts from the record on appeal in the said case of Mark J. Davis against Fowler Brothers, Ltd., and Anglo-American Provision Company, and that this is the same case mentioned and set forth in Defendant's Exhibit A, March 15, 1901.

Objected to as incompetent, irrelevant and immaterial.

Testimony closed.

JOHN A. SHIELDS, *Examiner.*

120 DEFENDANTS' EXHIBIT B.

Supreme Court.

Trial desired in Clinton county.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED, and ANGLO-AMERICAN Provision Company, Defendants. } Summons.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment

will be taken against you by default, for the relief demanded in the complaint.

Dated June 12, 1894.

WEEDS, SMITH & CONWAY,
Plaintiff's Attorneys.

Office and post-office address, Plattsburgh, New York.

121 N. Y. Supreme Court, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED, and ANGLO-American Provision Company, Defendants.
} Action No. 1. Complaint.

I.

Plaintiff for complaint herein alleges and respectfully shows to this court:

First. That plaintiff is a foreign corporation duly organized under and pursuant to the laws of the State of Illinois, having its principal office in that State, in the city of Chicago, and county of Cook; and its principal office in New York State, in Plattsburgh.

Second. That plaintiff has complied with all the requirements of law of this State to authorize it to carry on business and to sue within this State, and that it has procured from the secretary of state the certificate required for that purpose by section fifteen of the general corporation law.

Third. That the plaintiff was organized in 1886 to carry on a general meat and provision business in Chicago and the State of New York, and to sell and deal in meats and other provisions, grain and flour, on commission and otherwise, and has been engaged continuously in such business since its organization in said places, and having offices in Albany and Plattsburgh, New York, and in Chicago, as aforesaid.

Fourth. That the above-named defendant, Fowler Brothers,
122 Limited, is a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain.

Fifth. That during the times hereinafter stated the defendant, The Anglo-American Provision Company, was a foreign corporation, organized and existing under the laws of the State of Illinois, and engaged in and doing business there, and also largely engaged in business in the State of New York, having offices in New York city from and through which its business in this State was mainly done and conducted, including a large part of its business with plaintiff.

Sixth. That during the years 1886 to 1893, both inclusive, plaintiff purchased from the defendant, The Anglo-American Provision Company, goods and merchandise, to wit, meats and provisions, flour and grains of various kinds, aggregating in value several millions

of dollars; that such purchases were made by plaintiff from said defendant within this State.

That many of the goods delivered to and for plaintiff pursuant to such purchases proved to be inferior in quality to those ordered and which ought to have been delivered by said Anglo-American Provision Company, and were not merchantable and were much less in value than they would have been had they been of the quality ordered, whereby this plaintiff sustained great loss and damage.

That said goods were purchased to be by plaintiff supplied to its customers, as was well understood; and their inferiority caused a loss of customers to plaintiff, as well as other injury to its business, and obliged plaintiff to make large allowances and deductions to its customers as well as to pay damages. That in many cases goods so bought and delivered were returned on account of such defects, after being paid for by plaintiff, and received and retained by said Anglo-American Provision Company, which refused and failed to repay or return the consideration which had been paid by plaintiff for said returned goods. That such defective and unmerchantable goods were received and retained and sold by plaintiff under a cus-
123 tom and agreement between the parties that such receipt and retention of sale would not waive or affect plaintiff's claims for damages or reimbursement on account of said goods being defective and inferior.

That settlements were heretofore made by and between plaintiff and said Anglo-American Provision Company for all goods which plaintiff had purchased of said company, and such settlements were made with full knowledge on the part of said Anglo-American Provision Company of the claim for damages by reason of such defective goods and also the loss of profits and customers occasioned thereby, the particulars of which, except as to loss of profits and customers, had been from time to time communicated to said company by plaintiff, and upon the express agreement made by said company, for the purpose of and in consideration of such settlements, that plaintiff's damages and its claims for damages made by it upon said Anglo-American Provision Company should not be prejudiced by such settlements, but that all previous damages and claims for the same should, notwithstanding, be examined, adjusted, allowed and paid by said Anglo-American Provision Company; that the amount of damages sustained by plaintiff by reason of such defective and unmerchantable goods, allowances, deductions and loss of trade and customers during said years by reason of defective goods delivered by said defendant upon purchases made within this State was the sum of twenty-five thousand two hundred and twenty-nine and 77/100 dollars ($25,229.77).

Seventh. Plaintiff further alleges, upon information and belief, that on or about September 8, 1890, the defendant, said Fowler Brothers (Limited), was incorporated under the laws of Great Britain for the purpose (among others) of acquiring and carrying on the business which had theretofore been conducted by the said Anglo-American Provision Company, and consolidating it with the business of other

corporations acquired by it at the same time, or conducting
124 and carrying on said business in connection with said Anglo-American Provision Company, and being equally interested with said last-named company therein, and that it then or since and prior to the commencement of this action accepted and received a transfer to it of all the existing business of said Anglo-American Provision Company (including said business and claims of and with plaintiff aforesaid), and in consideration of such transfer, assumed, agreed to pay and became liable for as its own, or equally with said Anglo-American Provision Company, for all liabilities of said Anglo-American Provision Company, including the liabilities to the plaintiff by reason of unmerchantable or defective goods, and loss of trade and customers, delivered, purchased or accruing up to that time, as aforesaid.

That subsequent to September, 1890, all sales of goods made by said Anglo-American Provision Company to plaintiff, though made in its own name, were in fact made for or on account of said Fowler Brothers (Limited), or equally on its account as well as on account of said Anglo-American Provision Company; that plaintiff, prior to the commencement of this action, had several times requested the said Anglo-American Provision Company and said Fowler Brothers (Limited), to examine, adjust and pay its claims for damages, as aforesaid, which said Fowler Brothers (Limited), and said Anglo-American Provision Company neglected and omitted to do, and that plaintiff has sustained and is entitled to recover damages by reason of the premises to the amount of $25,229.77.

II.

For a second, separate and distinct cause of action plaintiff alleges upon information and belief:

First. It refers to, repeats and makes a part hereof, the first, second, third, fourth and fifth paragraphs of the first cause of action hereinbefore contained as though the same were herein again set forth at length.

Second. Plaintiff alleges that the defendant The Anglo-
125 American Provision Company and this plaintiff, during all the time from January 1, 1886, up to and including the year 1893, had large business dealings and transactions with each other in the purchase and sales of goods, meats, provisions and grain; that the transactions between said parties during the time aforesaid were thousands in number and involved goods and merchandise to the amount and value of many millions of dollars.

Third. That during all the time or times above referred to, the directors of said plaintiff have been three in number; Anderson Fowler, Robert Fowler and Henry Davis were the directors of the plaintiff from its organization until the death of Robert Fowler in 1891, and the vacancy thus created was filled by the election of Robert Stobo, and the board of directors so constituted continued without change until June, 1893, as hereinbefore stated; that during

the entire period referred to both Robert Fowler and Anderson Fowler were, until said Robert's death, directors and large stockholders in the said Anglo-American Provision Company, and Robert Stobo was a clerk in the employ of the said Anglo-American Provision Company, and wholly under the control of said Robert and Anderson Fowler, and of Anderson Fowler upon the death of Robert, having no actual or substantial interest in plaintiff.

Fourth. That in the course of the dealings between the said Anglo-American Provision Company and plaintiff it many times happened that goods were brought by plaintiff from said Anglo-American Provision Company and the goods delivered in pursuance of such purchases proved to be defective and unmerchantable in quality, and were rejected by customers, and either sold at a loss by plaintiff, or allowances and deductions had to be made to customers on prices, and plaintiff incurred loss and large expense thereby, or said goods were returned to said Anglo-American Provision Company, and by reason of such unmerchantable and defective goods claims were at the time made by plaintiff upon said Anglo-American Provision Company.

126 That such unmerchantable and defective goods were ordered and delivered in the State of New York, and the loss sustained accrued there, and all transactions and causes of action for damages claimed in this action are limited to damages for causes of action here arising, though similar and other damages were sustained outside this State. Said defective goods were accepted and retained by plaintiff when the same were not returned by reason of assurances given it by said Anglo-American Provision Company that the claims arising in favor of plaintiff by reason of such defects in goods delivered should always be properly adjusted and paid without regard to the retention of the same by plaintiff.

That said goods were purchased to be by plaintiff supplied to its customers, as was well understood, and their inferiority caused a loss of customers and profits to plaintiff, as well as other injury to its business. That in many cases goods so bought and delivered were returned on account of such defects after being paid for by plaintiff, and received and retained by said Anglo-American Provision Company, which refused and failed to repay or return the consideration which had been paid by plaintiff for said returned goods.

Fifth. That by reason of the premises and otherwise, and for trade and customers lost thereby, large claims accrued in favor of this plaintiff against said Anglo-American Provision Company during the times above specified, while, by reason of goods purchased by plaintiff of said Anglo-American Provision Company, large claims were continually accruing in favor of said Anglo-American Provision Company against plaintiff.

That at different times during said period, and particularly in June, 1891; March, 1892, and December, 1892, the Anglo-American Provision Company demanded a settlement of all outstanding transactions.

That plaintiff presented its different claims in its favor and against

said Anglo-American Provision Company, all of which had
127 previously and as they accrued from time to time, been made known to said Anglo-American Provision Company, and plaintiff demanded that in any settlement between the two companies they be included and allowed.

That in all such settlements Anderson Fowler acted for the Anglo-American Provision Company and Henry Davis for plaintiff; that the Anglo-American Provision Company, acting by said Fowler, refused to consider or allow the claims made by plaintiff, and insisted that the accounts of the Anglo-American Provision Company should be paid in full, and he, said Fowler, used his position and power as director of plaintiff, having the absolute control of its board of directors, he and his clerk, said Stobo, constituting a majority of plaintiff's directors, to compel plaintiff to settle the accounts of said Anglo-American Provision Company.

This plaintiff, through its president, Henry Davis, protested against such settlements unless its claims against said Anglo-American Provision Company were considered and allowed, but as the majority of plaintiff's directors were in the interest of the Anglo-American Provision Company, the protest was unavailing; and as said Anderson Fowler, acting for said Anglo-American Provision Company, assured plaintiff that its claims should not be prejudiced by such settlements, and as the transactiens between the two companies were then intended to be, and in fact were, continued, plaintiff took no further steps to enforce its rights or claims, relying on the promise of the Anglo-American Provision Company that plaintiff's claims should be adjusted and paid.

Sixth. That the action of said Anderson Fowler and said Stobo as directors of plaintiff in forcing a settlement of the accounts of the Anglo-American Provision Company against plaintiff were wrongful and in fraud of the rights of this plaintiff and its stockholders.

Seventh. That said Anderson Fowler continued to control
128 and dominate plaintiff until the meeting of its stockholders, held on June 6, 1893, when he was discarded and ceased to be longer a director of plaintiff, and a new director was elected to succeed him.

Eighth. That the defendant, Fowler Brothers (Limited), is a foreign corporation organized under the laws of the Kingdom of Great Britain, in September, 1890, for the purpose of carrying on and conducting the business theretofore conducted by several different corporations, among them the Anglo-American Provision Company; that said Anderson Fowler has been the promoter of said Fowler Brothers (Limited), and has been its managing directed in the United States since its organization.

That said Fowler Brothers, Limited, as soon as it was organized, in consideration of the transfer to it made by said Anglo-American Provision Company of its property, business and assets, which were of great value, assumed as its own, or assumed, agreed and became liable to pay equally with said Anglo-American Provision Company, the obligations and liabilities of the Anglo-American Provision Com-

pany, including the claims of plaintiff herein stated, and all business transactions by the latter since September, 1890, whether done in its own name or otherwise, has been in fact on account of, and for the benefit of, said Fowler Brothers, Limited, or for and on account of said Fowler Brothers, Limited, equally with said Anglo-American Provision Company, and said Fowler Brothers, Limited, has had at all times since its organization full and actual knowledge of all the facts and circumstances stated in this complaint, and of all facts and circumstances relating to the dealings between the plaintiff and the Anglo-American Provision Company.

Ninth. That upon a just and true accounting between the plaintiff and said Anglo-American Provision Company and said Fowler Brothers, Limited, as to all dealings, accounts, business claims, causes of action and transactions accruing and arising within this State, it will appear that said Anglo-American Provision Company
129 and said Fowler Brothers, Limited, and each of them, are justly indebted to plaintiff in a large amount.

That by reason of the voluminous and complicated character of the accounts and transactions between the plaintiff and the said Anglo-American Provision Company and said Fowler Brothers, Limited, the plaintiff has no remedy, or at least no adequate remedy at law, and the said accounts and matters in difference can only be properly examined through the equitable jurisdiction of this court.

Wherefore plaintiff demands judgment—

First. That all settlements of accounts heretofore made between plaintiff and the Anglo-American Provision Company be opened and set aside, and that the accounts between plaintiff and the Anglo-American Provision Company be stated and adjusted by this court as to the matters stated in the complaint.

Second. That the plaintiff recover from the defendants the sum of $25,229.77, or the amount which may be found justly due it.

Third. That plaintiff may have such other or further relief or judgment, or both, as may be just and equitable in the premises, besides costs.

WEEDS, SMITH & CONWAY,
Plaintiff's Attorneys.

Office and post-office address, Plattsburgh, N. Y.

STATE OF NEW YORK, }
County of Clinton, } ss:

Henry Davis, being duly sworn, says that he is an officer of plaintiff, namely, its president, and that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to
130 be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY DAVIS.

Subscribed and sworn to before me this 16th day of June, 1894.
THOMAS B. COTTER,
Notary Public, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED, and THE ANGLO-American Provision Company, Defendants.
No. 1. Amended Answer.

The amended answer of Fowler Brothers, Limited, and The Anglo-American Provision Company, defendants in the foregoing action, by Martin & Smith, their attorneys, to the complaint of the plaintiff.

First. The defendants admit the allegations contained in the first, third and fourth paragraphs of the said complaint, and admit that the Anglo-American Provision Company was a foreign corporation engaged in doing business in Illinois, as in the fifth paragraph of said complaint alleged, but denies that it had a place of business in the State of New York.

Second. The defendants admit that certain purchases were made by plaintiff from the Anglo-American Provision Company in this city, and settlements were heretofore made by and between plaintiff and the Anglo-American Provision Company for all goods
131 which plaintiff had purchased of said company, and that such settlements were made with full knowledge on the part of the Anglo-American Provision Company, that plaintiff claimed damages by reason of alleged defective goods and otherwise.

Third. The defendants deny each and every allegation contained in the first cause of action in said complaint not herein specifically admitted.

Fourth. And for a further and separate defense to the first cause of action in said complaint set forth, the defendants aver, on information and belief, that heretofore and before the commencement of this action, all the claims of the plaintiff in said cause of action set forth were for a valuable consideration and by lawful agreement between the plaintiff and the defendant, The Anglo-American Provision Company, settled, adjusted, accounted for and satisfied.

Fifth. And for a further and separate defense to the first cause of action in said complaint contained, the defendants aver, on information and belief, that heretofore, in a certain action in the supreme court of the State of New York, wherein the defendant, Fowler Brothers, Limited, was plaintiff, and The Davis Provision Company, plaintiff herein, was defendant, the said court being a court of record and of general jurisdiction, and having jurisdiction of the parties and of the subject-matter, the said plaintiff interposed as a defense to said action, the same claims set forth in the first cause of action in the complaint herein contained, and thereupon such proceedings were had in said action, that the plaintiff therein obtained judgment against the defendant therein for the full amount of the

plaintiff's claim, whereby the claims of the plaintiff herein in said first cause of action herein set forth, were adjudicated upon adversely and extinguished. And defendants aver, on information and belief, that all said claims of the plaintiff have been once adjudicated as aforesaid.

Sixth. And for a further and separate defense to the first cause of action in said complaint contained, defendants aver, upon
132 information and belief, that heretofore and prior to the commencement of this action, all claims and causes of action held or asserted by the said plaintiff against the defendants were fully paid to the said plaintiff.

II.

For amended answer to the second cause of action in said complaint alleged, the defendants aver:

First. They admit the allegations contained in the first paragraph of said second cause of action, repeating the first, third and fourth paragraphs of the first cause of action in said complaint contained, and admit that the Anglo-American Provision Company was a foreign corporation, engaged in doing business in Illinois and New York, as in the fifth paragraph of the first cause of action of said complaint contained.

Second. The defendants admit the allegations contained in the second paragraph of the second cause of action of said complaint.

Third. Defendants deny that Robert Stobo was under the control of Robert and Anderson Fowler, or either of them, as in the third paragraph of the second cause of action of said complaint alleged.

Fourth. Defendants admit that claims were made from time to time upon the Anglo-American Provision Company by the plaintiff, as in the fourth paragraph of said complaint alleged, and it avers that such claims were wholly without foundation.

Fifth. The defendants admit that the Anglo-American Provision Company demanded from plaintiff a statement of all outstanding transactions, as in said complaint alleged, and presented its different claims, as in said complaint alleged, and admits that the Anglo-American Provision Company refused to allow such claims, and admits that all such claims were settled between the plaintiff and the Anglo-American Provision Company.

Sixth. The defendants admit that Anderson Fowler was removed from his position as director of the plaintiff, and aver, on information and belief, that said removal was effected by one Henry
133 Davis, by device as follows: Certain of the capital stock of The Davis Provision Company, the plaintiff, was unlawfully issued, not for cash, but upon credit, and the same still remains unpaid for, and the said Davis obtained control of said stock, and induced the holders thereof to vote for directors selected by him, and removed said Anderson Fowler from his directorship, by means of a majority of stock, said majority being obtained by the use of said unlawful stock, and defendants admit that a new director was elected to succeed said Anderson Fowler in that manner.

Seventh. The defendants admit that the defendant Fowler Brothers, Limited, is a foreign corporation organized under the laws of the Kingdom of Great Britain, and that said Anderson Fowler has been the managing director of said Fowler Brothers, Limited, since its organization.

Eighth. The defendants deny each and every allegation in the second cause of action contained in said complaint not herein specifically admitted.

Ninth. And for a further and separate defense to the second cause of action in said complaint set forth, the defendants aver, upon information and belief, that heretofore and before the commencement of this action, all the claims of the plaintiff in said cause of action set forth were for a valuable consideration and by lawful agreement between the plaintiff and the defendant, The Anglo-American Provision Company, settled, adjusted, accounted for and satisfied.

Tenth. And for a further and separate defense to the second cause of action in said complaint contained, the defendants aver, on information and belief, that heretofore in a certain action in the supreme court of the State of New York, wherein the defendant, Fowler Brothers, Limited, was plaintiff, and The Davis Provision Company, plaintiff herein, was defendant, the said court being a court of record and of general jurisdiction and having jurisdiction of the subject-matter, and the parties, the said plaintiff interposed as a defense to said action, the same claims set forth in the second cause of action in the complaint herein contained, and thereupon such proceed-
134 ings were had in said action that the plaintiff therein obtained judgment therein for the full amount of the plaintiff's claims, whereby the claims of the plaintiff herein in said second cause of action herein set forth, were adjudicated upon adversely and extinguished. And defendants aver, upon information and belief, that all said claims of the plaintiff have been once adjudicated as aforesaid.

Eleventh. And for a further and separate defense to the second cause of action in said complaint contained, defendants aver, upon information and belief, that heretofore and prior to the commencement of this action, all claims and causes of action held or asserted by the said plaintiff against the defendants were fully paid to the said plaintiff.

Wherefore defendants demand that the complaint herein be dismissed with costs.

MARTIN & SMITH,
Defendants' Attorneys, No. 50 Wall Street,
New York City, N. Y.

CITY AND COUNTY OF NEW YORK, *ss:*

Anderson Fowler, being duly sworn, says that he is the managing director of Fowler Brothers, Limited, and the president of The Anglo-American Provision Company, the defendants in the above-entitled action; that he has read the foregoing amended answer, and knows the contents thereof; that the same is true to his own

knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ANDERSON FOWLER.

Sworn to before me this 13th day of October, 1894.
[L. S.]
EDWIN B. WOODS,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

135

N. Y. Supreme Court.

THE DAVIS PROVISION COMPANY, Plaintiff, *against* FOWLER BROTHERS, LIMITED, and ANGLO-American Provision Company, Defendants. } Action No. 1. Bill of Items.

To Messrs. Martin & Smith, attorneys for defendants.

SIRS: You will please take notice that the following is a copy of the items of plaintiff's account, demanded by you in the above-entitled action, consisting, first, of a statement of the nature of the various claims and the amounts thereof; and second, of schedules properly referred to, giving the items where the amount is made up of more than one:

Date.	Nature of claim.	Amount.
1888.		
May 8.	Inspecting and coopering 803 tcs., S. P. hams and shoulders shipped to New York, Schedule "A"	$401 50
1890.		
Jan. 15.	20 boxes smoked hams 13 avg. 10,056 at 1c. charged back on account delay in shipping	100 56
1891.		
May 23.	Expenses of H. Davis to and from Elmira	55 00
Aug. 13.	Shrinkage on 2,627 pcs. D. S. backs shipped Weehawken, June 30, 1891, 1,040 lbs., at 5½c., $57.20; frt. $3.64	60 84
Aug. 30.	Losses and allowances, Schedule B	1,331 25
Dec. 31.	Claim on 300 tcs. S. P. hams, p. Jan., 1891, Schedule C	2,102 07
" 31.	Claim on 75 tcs. S. P. shoulders, p. May 26, 1891, Schedule D.	497 25
" 31.	Claim on 175 tcs. S. P. hams, p. Jan. 1, 1891, Schedule E	999 93

136

1891.		
Dec. 31.	Allowance and loss on 42 bbls. sheer clear pork, Schedule F	128 85
" 31.	Allowance made (*i. e.*, deducted by J. H. Velies of Poughkeepsie) on account "sour meats"	33 00
" 31.	Allowance made (*i. e.*, deducted by J. H. Thompson of Rondout) on account "sour meats"	839 50
" 31.	Loss on 3 cars corn shipped Oct. 12 on acc't being shrunk, corn dirty and mixed with middlings, $20 per car	60 00
1892.		
Sept.	Loss on 25 tcs. S. P. Cala hams, Schedule "G"	214 64
Oct. 31.	Loss on 20 boxes summer sausage, Schedule "H"	192 90

Date.	Nature of claim.	Amount.
1893.		
Apr. 29.	Loss on smoked hams 10-11 avg. shipped to Charleston and sold for our account. These hams were out of lots of 50 tcs. delivered to J. Allen & Co., Philadelphia, car 4228 from Chicago, July 26, and lot of 75 tcs., car 4418 to Weehawken, Aug. 1	547 24
" 29.	Amount deducted by J. B. Carberry for loss on shipments Holsteiner and Farmer sausage	305 82
" 29.	Amount allowed Davison & Skidmore for loss on small hams out of lot 75 tcs. from Chicago, August	50 00
" 29.	Loss on shipment of Holsteiner, Schedule I	327 15
1891.	Interest on erroneous charge of debit by A. A. P. Co. for quantity of shoulders improperly charged to plaintiff (see invoice of A. A. P. Co. of July 28th, 1891)	925 00
	These shoulders were purchased of Armour & Co., and delivered to A. A. P. Co. for packing only	
	Interest on items of plaintiff's claim to Nov. 1, 1894	1,666 78
		$10,839 28

137 SCHEDULE A.

Anglo-American Provision Co., Chicago, Ill., Drs.

1 L. B. 133. MAY 2, 1888.

Inspecting and coopering S. P. hams and shoulders as follows:

1887.						
Oct. 15.	60 tcs.	S. P.	hams,	F. C. & Co.		
" 29.	45 "	"	shlds.,	"		D
" 29.	3 "	"	hams,	"		A12
Nov. 1.	3 "	"	"	"		A14
" 4.	5 "	"	"	"		G
1888 & 1885.						
Mar. 10.	45 "	"	"	"		H
" 10.	100 "	"	"	"		I
" 10.	100 "	"	"	"		K
May 2.	5 "	"	"	"		C
" 2.	5 "	"	"	"		D
" 2.	5 "	"	"	Ills. P. C.		M
" 2.	5 "	"	shlds.,	Banner		P
" 2.	175 "	"	hams,	F. C. & Co.		C
" 2.	36 "	"	"	"		D
" 2.	48 "	"	"	"		E
" 2.	37 "	"	"	"		A
" 2.	126 "	"	"	Ills. P. C.		M
	803 tierces at 50 cts.					$401 50

SCHEDULE B.

D. B. F. 429. SEPTEMBER 30, 1891.

Loss and allowance on 25 tcs. S. P. hams, 10 avg. M. P. & P. C. brand, shipped to Troy, July 29	$393 75
Loss on 50 tcs. S. P. hams, 10 avg. M. P. & P. C. brand, shipped to Weehawken, Aug. 1, 15,000 at 6¼	937 50
	$1,331 25

138

SCHEDULE C.

Claim on 300 tcs. S. P. hams, 12 avg. forming part of invoice of January 1, 1891, shipped to New York by the A. A. P. Co. without instructions.

DR.

1891.				
Jan. 1.	300 tcs. S. P. hams 12 avg. 90,000 at 8½			$7,987 50
	Smoking 25 tcs.	$18 75		
	Freight	5 25		
	Cartage	3 75		
	Freight on 5 tcs. to Troy	1 60		
	Storage charges paid	264 02		
	Allowance made for 2 tcs. "bad"	48 00		
	Overhauling 54 tcs.	32 40		
			373 77	

CR.

Sales.

100 tierces,	30,000 at 8½		$2,550 00
20 "	6,000 " 8¾		525 00
75 "	22,500 " 9		2,025 00
10 "	3,000 " 9½		285 00
5 "	1,500 " 10		150 00
5 "	" 9 00 per tc		45 00
5 tierces	smoked 1,400 at 9½		133 00
20 "	5,462 at 10		546 20
60 "	returned,		
300 "			
Balance			2,102 07
		$8,361 27	$8,361 27
Balance down, claim on account loss			$2,102 07

December 31, 1891.

139

SCHEDULE D.

Claim on 75 tcs. S. P. shoulders ex. car 4165 May 26, 1891, Chicago to Syracuse, part of invoice Mar. 2, 500 tcs. at 4⅝ $6,937.50 rejected by Hammond & Co.

DR.

	75 tcs. S. P. shoulders at 4⅝			$1,040 62
Aug. 4.	Smok'g 5 tcs. 3.75 frt. 1.05 cartage .75		$5 55	
" 20.	Smok'g 5 tcs. 3.75 frt. 1.05 cartage .75		5 55	
Sept. 2.	Smok'g 10 tcs. 7.50 frt. 2.10 cartage 1.50		11 10	
" 2.	Frt. chgs. stge. & com. 2 tcs. shipped Low & Co. N. Y. 1		1 61	
" 2.	Ret'd by D. P. Co. 1 bbl. 172 at 7		12 04	
" 2.	Sold by Low & Co. frt. ctge. stge. & com.		1 07	
Oct. 5.	Ret'd by Mulholland 8 tcs. 2,400 at 6 $144.00, frt. $2		146 00	
" 19.	Ret'd by D. P. C. 7 bbls. 2,028 at 7	141 96		
	Frt. to and from Plattsburgh 8.96 sold by Low & Co. frt. stge. ctge. & com. 6.09	15 05	157 01	
" 28.	Ret. by Metzger 5 tcs. at 5½	82 50		
	Frt. 6.05, smok'g 3.75 chg. 75	10 85	93 35	

Nov. 24.	Ret. by D. P. Co. 1 bbl. 314 at 7...		21 98		
	Sold by Low & Co. frt. stg. ctg. & com.		1 37		
				23 35	
					456 63
140	Inspecting and overhauling 32 tcs.				20 40
	Icing				3 00
	Frt. Chicago to Syracuse			66 98	
	Syracuse to New York			42 75	
					109 73

Cr.

Aug. 4.	5 tcs. smoked,	1,372 at 6				$82 32
" 20.	5 " "	1,358 " 7				95 06
" 21.	10 " Mulholland,	3,000 " 6¼				187 50
Sept. 2.	10 " smoked,	508 " 2				162 66
" 24.	10 " Mulholland,	3,000 " 6				180 00
Oct. 5.	18 " Metzger & Son	5,400 " 5½				297 00
Nov. 3.	5 " smoked,	1,412 " 7				98 84
Sept. 8.	1 bbl. smoked to Low & Co.,	186 " 2				3 72
Oct. 22.	7 tcs. smoked to Low & Co.,	2,003 " 1.				20 03
Dec. 1.	1 tc. smoked to Low & Co.,	300 " 2.				6 00
	72					
	Balance (24 tierces returned)					497 25
					$1,630 38	$1,630 38
	Balance down claim on account loss					497 25

Agreement of tierces.

75 tierces original invoice.
9 bbls. smoked shoulders returned and reshipped to Low & Co., sold by them.
8 tierces S. P. shoulders returned by Mulholland.
5 " " " Metzger.

97 tierces.

72 tierces credited per account sales.
24 " returned.
1 " short in repacking.

97 tierces.

141 SCHEDULE E.

Claim on 175 tcs. S. P. hams 16 avg. forming part of invoice of January 1, 1891, shipped to New York by A. A. P. Co. without instructions.

Drs.

175 tcs. S. P. hams 16 avg. 52,500 at 8½			$4,462 50
16 " returned, 4,800 at 8½			408 00
			$4,870 50
Freight on 16 tcs. returned	$20 32		
" 23 "	4 83		
Smoking 39 tcs.	29 25		
Cartage	5 00		
Storage charges paid	218 70		
Overhauling & coopering 52 tcs.	31 20		
		309 30	

CRS.

Sales.

100 tcs.	30,000 at 8¼			$2,475 00
45 "	13,500 " 8½			1,147 50
23 " smoked,	6,193 " 9			557 37
4½ " returned.				
2½ " short on overhauling.				
191	Balance			999 93
			$5,179 80	$5,179 80
	Balance down claim on account loss			$999 93

SCHEDULE F.

Allowance & loss on 42 bbls. sheer clear pork out of lots shipped to C. E. Crouse & Co., Syracuse, August 18th & 28th, 1891 $128 85

December 31, 1891.

142 SCHEDULE G.

1892. DR.

Sept. 6. Loss on 25 tcs. S. P. Cala hams, invoiced to us March 1st, and shipped to J. Allen & Co., Philadelphia, June 4.

25 tcs. S. P. Cala hams, 7,500 at 5⅜	$403 13	
Freight Chicago to Philadelphia	26 60	
" Philadelphia to New York	10 30	
Cartage	2 20	
Interest 30 days	2 02	

CR.

Sales.

8 tierces	2,266 at 3½			$79 31
14 "	4,360 " 3			130 80
1 "	300 " 6½			19 50
	Balance			214 64
			$444 25	$444 25
	Balance down claim on account loss			$214 64

SCHEDULE H.

1892. DR.

Oct. 31. Loss on 20 boxes summer sausage rejected by R. Hahne & Son out of shipment 50 boxes p. May 23.

May 23. 20 boxes summer Hauss, 300 at 12	$360 00	
Freight Chicago to New York	9 90	

CR.

Sales.

Aug. 2.	4 boxes,	600 at 10		$60 00
" 29.	13 "	1,950 " 6		117 00
	3 "	shrinkage		
		Balance		192 90
			$369 90	$369 90
	Balance down claim on acc't loss			$192 90

143 SCHEDULE I.

1892. Loss on 154 bbls. Holsteiner.

DR.

Nov. 3.	125 bbls. Holsteiner, 21,625 at 12	$2,595	36
	22 bbls. Holsteiner, 3,894 at 12	467	28
	7 bbls. Holsteiner, rejected from previous shipments 1,304 at 11¾	153	22
	Freight Chicago to New York	80	48
	Cartage	7	70

CR.

Sales.

11 bbls. Holsteiner,	1,969 at 12			$236 28
36 " "	6,345 " 11¾			745 54
27 " "	4,544 " 11½			522 56
63 " "	10,689 " 11			1,175 79
10 " "	1,721 " 10½			180 71
7 " "	1,289 " 9			116 01
Balance				327 15
		$3,304	04	$3,304 04
Balance down claim on account loss				327 15

Plaintiff does not include in the foregoing bill of items items of damages for loss of customers, injury to business, etc., but the same is claimed in the action and will be upon the trial.

WEEDS, SMITH & CONWAY,
Attorneys for Plaintiff, Plattsburgh, N. Y.

STATE OF NEW YORK, }
County of Clinton, } *ss:*

Henry Davis, being duly sworn, says that he is an officer of above-named plaintiff, namely, its president; that he has read and knows the contents of the foregoing bill of items, and that the same is true to the best of his knowledge and belief; that the sources of his information and the grounds of his belief are his familiarity with
144 the business between plaintiff and defendant, out of which the cause of action grew, and with the books and accounts relating to the same, and an examination of said accounts.

HENRY DAVIS.

Subscribed and sworn to before me this 29th day of October, 1894.

THOMAS B. COTTER,
Notary Public.

At a special term of the supreme court, held at the city of Schenectady on Monday, the 12th day of November, 1894.
Present: Hon. S. Alonzo Kellogg, justice.

DAVIS PROVISION COMPANY
against
FOWLER BROTHERS, LIMITED, and ANGLO-AMERICAN Provision Company. } Action No. 1.

On reading and filing the pleadings in this action and the affidavit of Thomas F. Conway, sworn October 19, 1894, and the notice of this motion, and after hearing Frank E. Smith, of counsel for plaintiff, on the motion and Mr. William A. Poste, Esq., of counsel for defendant, appearing but not opposing, and on motion of Weeds, Smith & Conway, attorneys for plaintiff, it is

Ordered, that this action and all the issues therein be referred to Hon. Winslow C. Watson of Plattsburgh, N. Y., counselor-at-law, as sole referee, to hear, try and determine the same.

145 It is further ordered that said referee, in his discretion, may sit in Clinton, Albany or New York counties.

S. A. KELLOGG, *J. S. C.*

Enter in Clinton county.

J. B. ALEXANDER, *Clerk.*

N. Y. Supreme Court, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED, and ANGLO-AMERICAN Provision Company, Defendants. } Action No. 1.

I, Winslow C. Watson, referee in the above-entitled action, the oath prescribed by statute having been duly waived, having been attended by the respective parties and their counsel, and having heard and considered the evidence given in the action and the arguments of counsel, and after duly considering the same, do hereby respectfully report to the court and decide as matter of law and fact herein as follows:

Findings of Fact.

1st. That the plaintiff, The Davis Provision Company, is, and at all times mentioned in the complaint was, a foreign corporation, duly organized pursuant to the laws of the State of Illinois
146 in February, 1886, and since its formation has had its principal office in the State of Illinois, county of Cook, and its principal office in New York State in Plattsburgh, N. Y. That its main places of business were at all times in New York State, its Chicago office being used as a place to keep its corporate records and hold its meetings.

2d. That the plaintiff duly complied with all the requirements of law of the State of New York to authorize it to carry on business and to sue within the State, and duly procured from the secretary of state the certificate required for that purpose by section fifteen of the general corporation law.

3d. That plaintiff was organized to carry on a general meat and provision business in Chicago, and in the State of New York, and to sell and deal in meats and other provisions, grain and flour, on commission and otherwise, and was continuously engaged in such business since its formation and until after the commencement of this action, having offices in Albany and Plattsburgh in New York State.

4th. That prior to and at the time of the formation of the Davis Provision Company Henry Davis, who thereafter became the president of said company, individually and also in connection with one Anderson Fowler, then a director and afterwards president of the defendant Anglo-American Provision Company, were engaged in carrying on and conducting a profitable business of the same kind which the plaintiff was formed to conduct in the State of New York and elsewhere.

5th. That the main purpose of organizing the Davis Provision Company, or plaintiff, was to handle and dispose of the product, meats, etc., in this State and elsewhere, of the defendant The Anglo-American Provision Company, and also of Fowler Brothers.

6th. That at the time of the formation of the plaintiff the Anglo-American Provision Company was a foreign corporation, organized and existing under the laws of the State of Illinois, and en-
147 gaged in the wholesale meat and provision business, and dealing very largely in pork, sausages, grain, etc., and doing an extensive business throughout the United States and in England. That the main ware-house and place of business of defendants during the times plaintiff did business with them and each of them, where their meats and goods were kept and shipped from, was at Chicago, Illinois.

7th. That said Anderson Fowler and his brother, Robert D. Fowler, who was then president of said Anglo-American Provision Company, together owned the greater part of the stock of the Anglo-American Provision Company and continued to own it until its transfer to defendant, Fowler Brothers, Limited, as hereinafter found.

8th. That at and just before the time of the formation of the plaintiff the defendant, The Anglo-American Provision Company, through said Fowlers, agreed with said Henry Davis that if he would consent to the formation of the Davis Provision Company for the purposes aforesaid, and take stock in the same, that the Anglo-American Provision Company would supply the Davis Provision Company, upon its formation, with all the goods and credit it needed to do a large and extensive business, and that said Fowlers would take a large amount of the capital stock of the plaintiff; and it was further understood and agreed that the plaintiff was to handle and dispose of

all the goods and meats of the defendant, The Anglo-American Provision Company, that were to be sold in the State of New York, excepting in New York city and Brooklyn.

9th. That thereupon and pursuant to said understanding and agreement the Davis Provision Company was organized with a capital stock of $25,000, of which said Anderson Fowler and said Robert D. Fowler took one-third each, and said Henry Davis took one-third. That in 1890 the capital stock was increased to $100,000, of which about $74,000 was issued to various persons.

10th. That immediately upon the formation of the Davis Provision Company it adopted and acted upon the agreement and understanding aforesaid, made between said Davis and said Anglo-American Provision Company, and both the plaintiff and said Anglo-American Provision Company commenced doing business of the nature specified pursuant thereto, both agreeing and assenting to the same.

148

11th. That said Henry Davis was elected president of the Davis Provision Company upon its formation in 1886, and has so continued since, and was also made general manager of its business, and as a matter of fact was given and allowed to exercise large powers in conducting, managing and carrying on the business, being in practice permitted and expected to do so largely on his own judgment, notwithstanding the company had a board of directors.

12th. That the board of directors of the plaintiff from its formation was composed of said Henry Davis, said Anderson Fowler and said Robert D. Fowler until October, 1889, when said Robert Fowler was succeeded by one Robert Stobo as director.

13th. When the Davis Provision Company was formed Robert Fowler was the president and manager of the Anglo-American Provision Company in the United States, and so continued until some time in 1889, and a large stockholder in the same; and said Anderson Fowler was also, at the time of the formation of the Davis Provision Company, a director of the Anglo-American Provision Company, and a large stockholder therein, and so continued down to date; at the time, or soon after the formation of the Davis Provision Company, said Anderson Fowler became treasurer of the Anglo-American Provision Company; the business of the Anglo-American Provision Company was done under the supervision of its board of directors and the management of Robert Fowler while he was president; said Robert Stobo was also a director in the Anglo-American Provision Company from about the time the Davis Provision Company was formed until 1895.

14th. That said Robert D. Fowler ceased to be president of the Anglo-American Provision Company in the spring of 1889, and was succeeded by his brother, said Anderson Fowler, in the presidency and management of the business, and he has continued to be the active manager of the business of that company since.

149

15th. That the defendant, Fowler Brothers, Limited, is a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain, and was formed the 8th day of September, 1890.

16th. That it was organized for the purpose, among others, of conducting and carrying on a wholesale meat and provision business, and of exporters and importers, and also of taking over and carrying on the business of various corporations, among others, of the defendant, The Anglo-American Provision Company, and has kept since its formation an office in the State of New York and also one in Chicago, in the State of Illinois, and has been actively engaged in conducting the business it was formed to do, and complied with section fifteen of the general corporation law of this State, and was entitled to carry on business here.

17th. Its offices in Chicago and in New York were each kept in the same building and place as those of the Anglo-American Provision Company; Robert Stobo had charge of the business of Fowler Brothers, Limited, in Chicago, in connection with Anderson Fowler, and said Anderson Fowler was the managing director and had general charge of the Fowler Brothers', Limited, business in the United States.

18th. After the formation of Fowler Brothers, Limited, in 1890, though the Anglo-American Provision Company continued to exist, the business done by it was done for Fowler Brothers, Limited, it having taken over all the stock and business of the Anglo-American Provision Company; all the business in New York done by the Anglo-American Provision Company or Fowler Brothers, Limited, was done by Fowler Brothers, Limited, and the business done in Chicago by the Anglo-American Provision Company or Fowler Brothers, Limited, was done in the
150 name of the Anglo-American Provision Company, and all business, wherever done, belonged to Fowler Brothers, Limited, subsequent to its formation, whether done in the name of the Anglo-American Provision Company or otherwise, or belonged to both companies equally.

19th. That among the assets of Fowler Brothers, Limited, since its formation, was the stock, business and property of the Anglo-American Provision Company, it having taken the same over by a formal transfer and having assumed all its obligations.

20th. That Anderson Fowler and Robert Fowler were both stockholders and directors in Fowler Brothers, Limited, since its formation until the death of Robert Fowler, and thereafter Anderson Fowler continued to be a stockholder and director down to the present time.

21st. That business between plaintiff and defendants was always conducted on the part of defendants in the name of Anglo-American Provision Company, and was solely with it until the formation of Fowler Brothers, Limited, in 1890, and thereafter, although conducted in the name of the Anglo-American Provision Company, was the business of Fowler Brothers, Limited, or its business equally with that of the Anglo-American Provision Company.

22d. That it was understood and agreed at the outstart of the dealing between plaintiff and the Anglo-American Provision Company that the defendant, The Anglo-American Provision Company

would supply meats and provisions and articles it dealt in to the Davis Provision Company as it should want or order them, and that the goods should be first class and in good condition when delivered, the place of delivery to be the place to which the Davis Provision Company ordered them shipped to its customers, and this agreement and understanding was never changed during the time the plaintiff and defendants, or either of them, did business together.

23d. That almost immediately upon the formation of the
151 Davis Provision Company it commenced doing business with the Anglo-American Provision Company and continued until 1893, upon the understanding and agreement before found, the business on the part of the defendant, The Anglo-American Provision Company, being done under its own name, in Chicago, and under the name of Fowler Brothers, in New York; but subsequent to the formation of Fowler Brothers, Limited, in 1890, it was done under the name of Fowler Brothers, Limited, New York; that from the start the Davis Provision Company purchased all its supplies from the Anglo-American Provision Company, except comparatively few purchases of goods that the Anglo-American Provision Company could not supply.

24th. That a large business was done from the start between the Anglo-American and the plaintiff; the first year it amounted to about a million of dollars, and afterwards to two millions of dollars a year.

25th. That after a time, goods purchased by the plaintiff of the Anglo-American Provision Company as first-class and sound goods were, and were found to be, unsound and defective.

26th. That upon the first shipments and receipt of such unsound and defective goods plaintiff objected to them and called the attention of Robert D. Fowler, the president and managing director of the Anglo-American Provision Company, to the condition of the goods and the fact that they were not such as were ordered, or plaintiff was entitled to; that thereupon and thereafter it was agreed and understood between plaintiff and defendant, The Anglo-American Provision Company, that the said defective and unsound goods should not be returned, but be disposed of to the best advantage possible by the plaintiff, either by settlements with or deductions to the purchaser to whom they were originally shipped, or by sales of the same to those as would best, in the judgment of Henry Davis, the manager of plaintiff, protect the Anglo-American Provision Company from loss, and that the defendant, The Anglo-American
152 Provision Company, would make good to the plaintiff and pay the loss or damage sustained by the plaintiff on account of such defective and unsound goods, and this understanding and agreement continued during the time the plaintiff and defendants did business together, and was not changed or varied in any way, but business was done by the plaintiff in accordance therewith and in reliance thereon.

27th. That plaintiff always purchased first-class goods and merchandise and was entitled to have them shipped to and received by

its customers and itself and the parties to whom they were sold, in that condition, except as to a small quantity of Illinois hams, but these were to be sweet and in a sound condition, and a small quantity of damaged or fire meats settled for in June, 1891.

28th. That plaintiff kept an account of the goods and merchandise shipped to its customers or to it, which were defective or unsound as aforesaid, and gave prompt notice to the defendant, The Anglo-American Provision Company, of the same and made claims upon the said defendant for reimbursement and payment of damages and loss sustained by the plaintiff, and said defendant, The Anglo-American Provision Company, from time to time sent its employees and others to investigate such matters; that the course of business between plaintiff and the Anglo-American Provision Company in regard to payment and book-keeping was as follows: Upon plaintiff ordering any certain amount of goods, the Anglo-American Provision Company would send an invoice to the Davis Provision Company, showing the amount and price of goods ordered and to be shipped, the goods mentioned in the invoice to be shipped to such place and at such time as the plaintiff directed, but in the meantime the amount of the invoice was placed upon the Anglo-American Provision Company's books in the account with the plaintiff as a charge against it; the plaintiff, on its part, on the assumption that the goods when shipped would correspond in quality and condition with the goods ordered, and that the
Anglo-American Provision Company would be entitled to the
153 full price thereof, gave credit upon its books to the Anglo-
American Provision Company for the full amount of the invoice, the goods, or a large part of them, frequently not being shipped or received until long thereafter; from time to time the Anglo-American Provision Company would draw on the plaintiff for the balance, or a part of it, appearing upon the Anglo-American Provision Company's books against the plaintiff, but did not draw for specific bills or invoices; these drafts the plaintiff would usually honor without taking out or deducting the amount of claims or loss on account of bad meats then existing in its favor against the Anglo-American Provision Company, or other claims.

29th. That the reason the plaintiff did not take out and deduct the amount of its damages on account of bad and defective goods, and its other claims from the drafts aforesaid from time to time, was that there had been no settlement or adjustment of the same, although the plaintiff frequently and persistently sought to have the amount of its damages and claims adjusted and agreed upon and deducted from the amounts claimed and drawn for by the Anglo-American Provision Company, but could not succeed in reaching an adjustment, being usually put off by the Anglo-American Provision Company with the statement that it had not time to investigate and verify the claims, and that as large transactions were constantly accruing between them, and large balances always owing from the plaintiff to the defendant, The Anglo-American Provision Company, the plaintiff could safely pay the drafts until such time

as final settlement was had; that in 1892, and again in 1893, itemized statements of the claims for damages made by the plaintiff in this action were furnished to the Anglo-American Provision Company and a demand for their settlement made, which was not complied with, and no settlement thereof was had, but said defendant promised to investigate and adjust them; that the plaintiff's
154 claims for damages in this suit were all kept upon its books from the time they, and each of them, arose.

30th. That those books and claims were several times examined and inspected by men sent for that purpose by the defendant, The Anglo-American Provision Company; that there was at no time while plaintiff was dealing with the defendant, The Anglo-American Provision Company, any agreement or understanding that plaintiff was to purchase upon Chicago terms, Chicago delivery, or Chicago inspection, or to accept or be bound by the same.

31st. That the inspection and examination of the goods by the defendant, The Anglo-American Provision Company, on account of the bad condition of which damages are sought in this action, was insufficient at Chicago, and the meats and sausages which were found to be bad upon delivery to the customers of Davis Provision Company, or parties to whom it had sold them, were unsound and defective before leaving Chicago, said inspection and examination at Chicago being so defective and insufficient that, even if the plaintiff had agreed to accept the inspection and examination of the Anglo-American Provision Company, at Chicago, it would not have been bound by it.

32d. That in or about March, 1892, the defendant The Anglo-American Provision Company asked plaintiff's note for the balance then due it as appeared upon its own books, but the plaintiff objected to giving such note or settling said balance until the claims it had for loss and damage on account of bad meats were first adjusted and offset against it; but Anderson Fowler, acting for the said Anglo-American Provision Company, and then its president and its manager in the United States, said he wanted the matter settled then and in that shape to go before the board of directors of his company, and that they could adjust the claims of plaintiff any time notwithstanding, as they had and would continue large dealings together, and thereupon the plaintiff gave a note in blank, which said defendant subsequently filled out in the amount of $27,102.71; that said note was given as an accommoda-
155 tion to the defendant, The Anglo-American Provision Company, and upon the understanding and condition that it was not to prejudice plaintiff's claims for damages, and when it became due, plaintiff declined to pay it unless its claims were allowed and deducted, and said note some time after its maturity was, upon the solicitation of the Anglo-American Provision Company, and its promise to examine and adjust plaintiff's accounts and claims, renewed upon the express agreement contained in the following letter, viz.:

"NEW YORK, *June* 7, 1892.

Henry Davis, Esq., president Davis Provision Company, New York.

DEAR SIR: In reference to our interview to-day, I wish to state that every claim of the Davis Provision Company on the Anglo-American Provision Company shall be taken up, carefully considered, and if it is shown to have any merit, the same will be promptly adjusted.

Yours truly, ANDERSON FOWLER,
President Anglo-American Provision Company, Chicago."

And thereupon, pursuant to and in reliance upon said letter, plaintiff gave two notes in renewal of said former note; one for $13,551.10 on three months' time, and one for $13,551.10 on four months' time. That plaintiff would not have renewed said note except for said agreement; that said letter referred to all plaintiff's claims which then had accrued, and was so understood at the time, and was not limited to a claim for goods returned by plaintiff, as claimed by defendants.

33d. That subsequently, and in December, 1892, the defendant The Anglo-American Provision Company requested another
156 settlement with plaintiff, and again plaintiff insisted, as a condition of settlement, that its claims be examined and allowed; that the said defendant assured plaintiff that they would be examined and adjusted when Mr. Fowler got back to Chicago, but in the meantime it wanted notes, and assured plaintiff that it could rely on the letter of June 7, aforesaid as sufficient for its protection, and thereupon plaintiff gave three notes for the balance claimed by said defendant: one on three months' time for $7,810.43, dated December 9, 1892, another bearing the same date on four months' time for $7,848.90, and another of the same date on five months' time for $7,887.34.

34th. That all of the notes hereinbefore mentioned were paid by the Davis Provision Company, except the two notes given December 9, 1892, for $7,848.90, and $7,887.34 respectively, which were transferred by the Anglo-American Provision Company to Fowler Brothers, Limited, which latter company brought suit thereon, as hereinafter found.

35th. That there was no settlement in either March or December, 1892, or at any other time or prior or subsequent to said times or either of them, of plaintiff's claims for damages on account of defective goods or otherwise, and no intention or agreement that they should be settled at the time of the giving of those notes or any of them; that in the statement of account from the defendant The Anglo-American Provision Company, to the plaintiff in March, 1892, when the $27,102.71 note was given in blank, an item appeared of $4,628.90 interest claimed by the Anglo-American Provision Company, but there was no agreement that interest should be paid; on the contrary, it was the course of business and the understanding that no interest was to be charged upon balances due from the plaintiff, and on Mr. Fowler's attention being called to this (he acting for

defendants), it was conceded by him, and that item stricken out without protest.

36th. That in or about July, 1889, soon after Anderson
157 Fowler took charge of the Anglo-American Provision Company business, no settlement was had in New York, as claimed by defendants, of the plaintiff's claims and damages, and no agreement was made that in the future the plaintiff should deal with the Anglo-American Provision Company as the Anglo-American did with its other customers, and would accept Chicago inspection or delivery or Chicago terms, and no settlement was had of plaintiff's claims at that time or at any other time in that year, nor subsequent thereto was any such agreement made; nor was any such agreement or understanding arrived at or made at the conversation or meeting Stobo testifies to in July, 1889, in Chicago.

37th. That at the meeting purporting (by the minutes on pages 47, 48 and 49 of the plaintiff's corporation record book) to be held in Chicago on June 23 and 24, 1891, which was not a regularly called meeting, but said Fowler, Stobo and Davis met together, and talked over their claims, no general settlement was had, and the claims of the plaintiff were not presented in full, or discussed or considered or settled, but only a few specific claims, which were then adjusted by themselves, and are no part of the claims sued for in this action, said latter claims being left open for settlement.

38th. That no vote was had or action of the board of directors of the Davis Provision Company taken at that meeting, or minutes made and entered upon its books, and that the minutes now appearing of said meeting on pages 48 and 49 of the record book of the Davis Provision Company, were not placed there for over two years afterwards, and Henry Davis, who acted for the plaintiff at that time, did not know of those minutes until late in the fall of 1893; that the items composing the sum of $1,803.71 purporting to have been allowed on said minutes were composed of very few items, one of which was for $1,200, or about that amount, for what is called fire meats, and the balance were a few claims separate from and independent of the claims of the Davis Provision Company for damaged and defective goods made in this action and the amount
158 purporting to have been allowed at said meeting and for which plaintiff received credit, namely, $1,803.71, was not allowed in consideration of the withdrawal or abandonment or settlement of the claims plaintiff makes in this suit or any part of them, or upon any consideration except the merits of the claims settled.

39th. That the minutes which appear on pages 48 and 49 of the Davis Provision Company record book of the meeting claimed to have been held on June 23 and 24, 1891, do not correctly state in full, or in substance, what was agreed upon at that meeting or done, and plaintiff was not bound to restore or return any part of what purports to have been allowed in that meeting, namely, $1,803.71, before bringing this action.

40th. That Henry Davis was not present at the next meeting sub-

sequent to June 23 and 24, nor were the minutes thereof ever read over in his presence or approved by him; that the business relations of the plaintiff and the Anglo-American Provision Company were very close during the time they did business together, and the plaintiff was at times largely dependent upon the Anglo-American Provision Company for credit and supplies and was not in a condition or position to assert its claims or enforce them in court without danger of loss and damage to itself, it having no contract for credit and supplies for any specified time, except the verbal agreement made at the outstart and relied and acted upon throughout the dealings of the Anglo-American Provision Company with the plaintiff that it would supply the plaintiff with all the goods and credits necessary to do an extensive business.

41st. That both prior and subsequent to each of the alleged settlements mentioned in the answer and hereinbefore referred to in those findings, plaintiff kept on presenting and insisting upon its claims for damages and all of them, both the claims which arose prior to said settlements as well as those which arose subsequent thereto.

42d. That prior to the commencement of this suit plaintiff
159 had paid in full the defendant The Anglo-American Provision Company for all goods, wares and merchandise purchased of it during the time they did business together at the invoice prices at which the goods were charged to the plaintiff by the Anglo-American Provision Company upon its books and also the other items claimed; that no deductions or allowances for damages on account of defective goods, except as hereinbefore found and except as to an item of about $5,000 in amount on account of defective hams which were returned by the plaintiff to the Anglo-American Provision Company at its settlement in December, 1892, and received by the Anglo-American Provision Company because they were defective and unsound to the amount of the invoice price therefor were credited back to the plaintiff, and a few other small, separate and specific items at that settlement; that, at the time of the meeting of June 23 and 24, 1891, at Chicago, when said $1,803.71 was allowed, the board of directors of the Davis Provision Company was composed of Henry Davis, Anderson Fowler and Robert Stobo, and said Robert Stobo and said Fowler were directors of the Anglo-American Provision Company, said Fowler being also its president and manager.

43d. That said board of directors of the Davis Provision Company continued without change until in or about June, 1893, when said Fowler ceased to be director, and one Smith M. Weed was elected director in his place, and thereupon and thereafter the new board of directors of the Davis Provision Company was composed of Henry Davis, Smith M. Weed and Robert Stobo.

44th. That Robert Stobo acted as secretary of the Davis Provision Company from its formation until December, 1893, and kept the minutes and record book of the company, and that said Davis had nothing to do therewith, and never examined it or was familiar with its contents.

45th. That neither said Davis nor said Weed knew about the min-

utes appearing on pages 48 and 49 of the Davis Provision Company record book, or the settlement therein reported, until October
160 or November, 1893, when they and each of them for the first time learned of them, and thereupon immediately proceeded to Chicago and held a meeting at the office of the company in Chicago, room 60, Board of Trade building, on December 2, 1893, at which meeting said minutes purporting to record said settlement and what took place at that alleged meeting, and the action in settlement of plaintiff's claims, were rescinded and avoided by the board of directors of the Davis Provision Company by a formal resolution passed and made a part of the minutes of the record of the company, said Stobo refusing to take part in the meeting or to allow the other directors to have the record book of the corporation, although he was secretary of the Davis Provision Company and in charge of the records of the same.

46th. That at and prior to the meeting of June 23 and 24, 1891, and subsequent thereto, said Fowler and said Stobo were hostile and acting in hostility and in opposition to the interests of the Davis Provision Company, and in favor of the Anglo-American Provision Company, of which they were officials.

47th. That, prior to the commencement of this suit, the board of directors of the Davis Provision Company, at a regularly called meeting, duly passed a resolution and authorized the bringing of this action.

48th. That subsequent to the giving of the notes in December, 1892, as hereinbefore found, two of them, namely, one for $7,848.90, given December 9, 1892, payable four months after date, and another, given upon the same day, for $7,887.34, payable five months after date, were assigned or transferred to the defendant, Fowler Brothers (Limited), and not being paid at maturity, except as to the sum of $3,848.90, said Fowler Brothers (Limited) brought an action in the supreme court of this State against the Davis Provision Company thereupon, and in that action the Davis Provision Company retained counsel and attempted to interpose an answer, having drawn, verified and sworn to an answer embodying, as an offset and counter-claim, the claims set forth in
161 this action, among others; and its answer was returned and not received by the plaintiff therein, upon the ground that an order directing the issues to be tried, as required by the code, was not procured, and judgment was obtained as by default in said action by said Fowler Brothers (Limited), and upon another note sued for in the same action, of $3,012; that thereafter the Davis Provision Company made a motion at a special term of the supreme court to excuse this default and be permitted to answer, and pending the motion, it was stipulated and agreed that the Davis Provision Company might pay the amount of the judgment without prejudice to its claims or right to bring an independent suit thereon, and that a formal order might be entered denying the said motion; that the Davis Provision Company did pay the amount of said judgment and said formal order was entered, and said Fowler Brothers (Limited)

accepted payment of the amount of said notes upon said stipulation and agreement, and that thereupon said action on the part of said Fowler Brothers (Limited) on said notes, by stipulation, was discontinued and the judgment entered thereon against the Davis Provision Company vacated.

49th. That at no time and at none of the settlements claimed by the defendants did the Anglo-American Provision Company take or ask for any receipt or acknowledgment of settlement in full or otherwise.

50th. That the note for $27,102.71 given by the plaintiff to the Anglo-American Provision Company in March, 1892, in the manner before found, was for the full amount of goods at the invoice prices purchased by the plaintiff of the Anglo-American Provision Company prior to the date of the note, and freights, storage charges and other charges and claims, including the damaged goods received prior to the date of the note, or purchased prior thereto, at invoice prices, on account of which plaintiff seeks to recover in this action; that the renewals of said notes were paid before the commencement of this action.

162 51st. That the notes given in December, 1892, which closed the account of the plaintiff with the Anglo-American Provision Company, included the balance due for all goods purchased by plaintiff of the Anglo-American Provision Company subsequent to the giving of said note in March, 1892, including all damaged goods shipped to the plaintiff since March, 1892, at the full invoice price, on account of which damage is asked for in this suit, and all claims and charges of defendants, or either of them, against plaintiff; and that subsequent to the giving of the notes in December, 1892, the dealings between the plaintiff and the Anglo-American Provision Company were cash dealings, there having been no further purchases on credit by the plaintiff.

52d. That the note given in March, 1892, as before found, for upward of $27,000, and its renewals, were with interest, and the notes given in December, 1892, were without interest.

53d. That during the early years of its formation and business relations with the Anglo-American Provision Company plaintiff did a very profitable business, and large dividends were declared, but that no bad or defective goods were shipped to or received by it, or upon its order, during said time, and no claims are made on account of such goods in this action for said years.

(The 54th to 69th findings of fact omitted by consent.)

69th. That the claims and causes of action set forth in the complaint accrued and arose within this State.

70th. That Henry Davis was vested with full power by planitiff to purchase its supplies and meats from defendant and agree on terms of purchase and doing business, and was depended on and expected in practice to exercise and act upon said powers in behalf of plaintiff and did so, said Fowlers and Stobo, or one of them, acting for defendants and each of them in their and each of their various transactions with plaintiff.

71st. That the plaintiff is entitled to recover interest on all
163 the items of damage accruing prior to March 15, 1892, from said date, and interest on all items accruing subsequent to March 15, 1892, from the 9th day of May, 1893.

Rulings on Questions of Law.

I find and decide as matter of law in this case:

First. That plaintiff was legally entitled to do business and to sue and be sued within this State at all times mentioned in the complaint, since its organization.

Second. That the same is and was true of the defendants, and each of them, since their organizations, respectively, and while plaintiff did business with them.

Third. That the settlement mentioned and embodied on pages 48 and 49 of the Davis Provision Company's corporate record of the claims and causes of action for which plaintiff brings this action, was voidable by the Davis Provision Company and was avoided by it in due and proper time and manner before the commencement of this action, and plaintiff is entitled to judgment avoiding, annulling and setting said settlement aside as to the claims and cause or causes of action set forth in the complaint.

Fourth. That plaintiff is entitled to recover from the defendant, The Anglo-American Provision Company, the items and damages heretofore found and specified in the foregoing findings of fact.

Fifth. That plaintiff is entitled to and to recover judgment against the defendant, The Anglo-American Provision Company, for five hundred two dollars and six cents ($502.06), together with interest thereon from the 15th day of March, 1892, to the date of this, my report, amounting in the aggregate to six hundred twelve dollars and one cent ($612.01).

Sixth. That plaintiff is entitled to and to recover judgment against the defendant, The Anglo-American Provision Company, and the defendant, Fowler Brothers, Limited, and each and both of them for sixty-four hundred eighty-one dollars and sixty-two cents
164 ($6,481.62), together with interest on fifty-seven hundred thirty dollars and fifty-nine cents ($5,730.59) thereof from the 15th day of March, 1892, and interest on the sum of seven hundred fifty-one dollars and three cents ($751.03) from the ninth day of May, 1893, to this, the date of my report, amounting in the aggregate to seventy-eight hundred forty-nine dollars and twenty-seven cents ($7,849.27).

Seventh. That plaintiff is entitled to costs and disbursements of this action, and to judgment therefor against defendants, and each of them.

Eighth. That the various notes given and payments made by plaintiff did not operate to settle or extinguish the claims made by plaintiff in this action, and did not preclude it from maintaining the action.

Ninth. Judgment is hereby directed in favor of plaintiff and

against defendants, and each of them, in accordance with the foregoing findings and decisions of law, namely: Against the defendant, The Anglo-American Provision Company for six hundred twelve dollars and one cent ($612.01), and against said defendant, and also against Fowler Brothers, Limited, and each and both of them, for seventy-eight hundred forty-nine dollars and twenty-seven cents ($7,849.27), also annulling and avoiding the settlement appearing on pages 48 and 49 of the corporate record book of the Davis Provision Company purporting to settle the claims in suit.

Dated November 9, 1895.

W. C. WATSON, *Referee.*

Fees and disbursements, $390.19, of which I have been paid by plaintiff, $50; by defendant, $50. Total, $100.

165 N. Y. Supreme Court, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff,
against
FOWLER BROTHERS, LIMITED, and ANGLO-AMERICAN Provision Company, Defendants. } Action No. 1.

Judgment dated the 13th day of December, 1895, and docketed the 13th day of December, 1895, at 11 h. a. m.

This action having been duly referred, by order of the court, to Hon. Winslow C. Watson, referee, to hear and determine the same and the issues therein, and he having qualified as referee and been attended by the respective parties and their counsel and heard the proofs in the case and the arguments of counsel, and thereafter duly made and filed his report, which is dated the 9th day of November, 1895, finding and deciding that the plaintiff is entitled to judgment against the defendant Anglo-American Provision Company for $612.01, and against said defendant Anglo-American Provision Company and the defendant Fowler Brothers, Limited, and each and both of them, for $7,849.27; also to judgment annulling and avoiding the settlement appearing on pages 48 and 49 of the corporate record book of the Davis Provision Company, purporting to settle the claims in suit, and also the costs of the action; now, on motion of Weeds, Smith & Conway, attorneys for the plaintiff, it is

Ordered, adjudged and decreed, that The Davis Provision Company, plaintiff in the above-entitled action, recover from and
166 against the defendant, Anglo-American Provision Company the sum of six hundred twelve dollars and one cent ($612.01) and interest thereon from the date of the referee's report, namely, $3.37, aggregating $615.38; also that the plaintiff recover from and against said defendant Anglo-American Provision Company and the defendant Fowler Brothers, Limted, and each and both of them, the sum of seventy-eight hundred forty-nine dollars and twenty-seven cents ($7,849.27) and interest thereon from the date of the said report, namely, $43.17, aggregating $7,892.44, together with

$1,349.38, costs and disbursements in this action, as taxed and allowed by order of the court.

Also it is adjudged and decreed, that the settlement mentioned aforesaid, appearing on pages 48 and 49 of the corporate record books of the Davis Provision Company, purporting to settle the claims in suit be and the same hereby is annulled and canceled; that plaintiff have execution for the amount of its judgment against each and both of said defendants.

H. A. WOOD, *Clerk.*

DEFENDANT'S EXHIBIT No. 5, MARCH 21, 1901.

STATE OF NEW YORK, } ss:
Clinton County, }

The Davis Provision Company, a corporation organized under the laws of the State of Illinois, does hereby certify:

I. That the objects and purposes for which it is formed and the business which it is now carrying on within this State are buying, selling and trading in grains, meals, provisions, oils, dairy products, fertilizers and all kindred goods and products.

II. That the principal place of business of said corporation
167 within this State is No. 84 Hudson street, in the city of New York, and a part of the business is also transacted in the city of Albany, and in the village of Plattsburgh, N. Y.

III. The person who is hereby designated as the person upon whom process against said corporation may be served within this State is Henry Davis, who has an office or place of business at No. 84 Hudson street, in the city of New York.

IV. That annexed hereto and marked Exhibits 1, 2, 3 and 4, are true copies of the several papers which, together, form its charter or certificate of incorporation, under the laws of the State of Illinois.

In witness whereof, the said corporation has caused its corporate seal to be hereto affixed, and these presents to be signed by its president this 26th day of December, 1892.

[L. S.] DAVIS PROVISION COMPANY,
By HENRY DAVIS, *President.*

STATE OF NEW YORK, } ss:
Clinton County, }

Henry Davis, being duly sworn, says:

I. I reside in the village of Plattsburgh, N. Y., and am the president of the Davis Provision Company.

II. I have read the foregoing certificate and know the contents thereof, and the same is true.

III. The papers annexed to said certificate and marked Exhibits 1, 2, 3 and 4, are each full, true and complete copies of their respective originals, and taken together they constitute the charter or certificate of incorporation of said company.

IV. I know the corporate seal of said company. The seal
168 affixed to the foregoing certificate is such corporate seal and was affixed to the said certificate by order of the board of directors of said company, and I signed my name thereto as president by like authority.

HENRY DAVIS.

Sworn before me this 26th day of December, 1892.

JOHN D. FILLMORE,
Notary Public, Clinton Co.

I consent that process against the Davis Provision Company may be served upon me as provided in the foregoing certificate.
Dated December 26, 1892.

HENRY DAVIS.

CLINTON COUNTY, *ss:*

On this 26th day of December, 1892, before me personally came Henry Davis, to me personally known to be the person who executed the foregoing consent, and acknowledged that he executed the same.

JOHN D. FILLMORE,
Notary Public, Clinton Co.

(Clerk's certificate.)

EXHIBIT 1.

STATE OF ILLINOIS, DEPARTMENT OF STATE.

Henry D. Dement, secretary of state, to all to whom these presents shall come, Greeting:

Whereas, it being proposed by the persons hereinafter named to form a corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning corporations," approved April 18, 1872, in force July 1, 1872, and the amend-
169 ments thereto, the object and purposes of which corporation are set forth in a statement and signed and acknowledged according to law, and this day filed in the office of the secretary of state.

Now, therefore, I, Henry D. Dement, secretary of state of the State of Illinois, by virtue of the power vested in, and the duties imposed upon me by law, do hereby authorize, empower and license Joseph Wright, Ingolf K. Boyesen and Michael Freiberger, the persons whose names are signed to the before mentioned statement, as commissioners to open books for subscription to the capital stock of Davis Provision Company, such being the name of the proposed corporation, as contained in the statement, at such times and places as the said commissioners may determine.

In testimony whereof, I hereto set my hand, and cause to be affixed the great seal of State:

Done at the city of Springfield this fifteenth day of January in the year of our Lord, one thousand eight hundred and eighty six, and of the Independence of the United States the one hundred and tenth.

(Signed) HENRY D. DEMENT,
[SEAL.] *Secretary of State.*

EXHIBIT 2.

STATE OF ILLINOIS, DEPARTMENT OF STATE.

Henry D. Dement, secretary of state, to all to whom these presents shall come, Greeting:

Whereas, a statement duly signed and acknowledged, has been filed in the office of the secretary of state on the 15th day of January, A. D. 1886, for the organization of the Davis Provision Company, under and in accordance with the provision of "An act
170 concerning corporations" approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached:

And whereas, a license has been issued to Joseph Wright, Ingolf K. Boyesen and Michael L. Freiberger, as commissioners to open books for subscription to the capital stock of the said company:

And whereas, the said commissioners have on the eighteenth day of February, A. D. 1886, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached.

Now therefore, I, Henry D. Dement, secretary of state of the State of Illinois, by virtue of the powers vested in me by law, do certify that the said Davis Provision Company is a legally organized corporation under the laws of this State.

In testimony whereof, I hereto set my hand and cause to be affixed the great seal of State.

Done at the city of Springfield this eighteenth day of February, in the year of our Lord, one thousand eight hundred and eighty six, and of the Independence of the United States the one hundred and tenth.

(Signed) HENRY D. DEMENT,
[SEAL.] *Secretary of State.*

171 EXHIBIT 3.

STATE OF ILLINOIS, } ss:
Cook County, }

Amount fees paid, $——.

To Henry D. Dement, secretary of state, Springfield, Ill.:

We, the undersigned, Joseph Wright, Ingolf K. Boyesen and Michael Freiberger, purpose to form a corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning corporations," approved April 18th, 1872, and all acts

amendatory thereof, and for the purpose of such organization, we hereby state as follows, to wit:

1. The name of such corporation is the Davis Provision Company.

2. The object for which it is formed is to conduct the business of buying, selling and trading in grains, meals, provisions, oils, dairy products, fertilizers and all kindred products and goods.

3. The capital stock shall be twenty-five thousand dollars.

4. The amount of each share is fifty dollars.

5. The number of shares is five hundred.

6. The location of the principal office is in the city of Chicago in the county of Cook, and State of Illinois.

7. The duration of the corporation shall be 99 years.

(Signed) JOSEPH WRIGHT.
(Signed) INGOLF K. BOYESEN.
(Signed) MICHAEL L. FREIBERGER.

STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry W. Booth, a notary public in and for the county
172 and State aforesaid, do hereby certify that on the 14th day of January, A. D. 1886, personally appeared before me Joseph Wright, Ingolf K. Boyesen and Michael L. Freiberger, to me personally known to be the same persons who executed the foregoing instrument, and severally acknowledged that they executed the same for the purposes therein set forth.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

[SEAL.] (Signed) HENRY W. BOOTH,
Notary Public.

EXHIBIT 4.

To Henry D. Dement, secretary of state of the State of Illinois:

The commissioners duly authorized to open books of subscription to the capital stock of the Davis Provision Company, pursuant to license heretofore issued, bearing date the 15th day of January, A. D. 1886, do hereby report that they opened books of subscription to the capital stock of said company, and that the said stock was fully subscribed.

That the following is a true copy of such subscription, viz:

We, the undersigned, hereby severally subscribe for the number of shares set opposite our respective names, to the capital stock of the Davis Provision Company and we severally agree to pay the said company for each share the sum of fifty dollars:

Names.	Shares.	Amount.
H. Davis	160	$8,000 00
Anderson Fowler, per Rob't D. Fowler, attorney	140	7,000 00
Robert D. Fowler	150	7,500 00
Frank Clifton	40	2,000 00
Charles Clifton	10	500 00

173 That on the 15th day of February, A. D. 1886, at room No. 18, No. 184 Dearborn St., Chicago, Ills., at the hour of 3 o'clock p. m. they convened a meeting of the subscribers aforesaid, pursuant to notice required by law, which said notice was deposited in the post-office, properly addressed to each subscriber, ten days before the time fixed therein; a copy of which said notice is as follows, to wit:

To —— —— (name and address):

You are hereby notified that the capital stock of the Davis Provision Company has been fully subscribed, and that a meeting of the subscribers of such stock will be held at room No. 18, No. 184 Dearborn St., Chicago, Ills., on the 15th day of February, A. D. 1886, at 3 o'clock p. m., for the purpose of electing a board of directors for said company, and for the transaction of such other business as may be deemed necessary.

JOSEPH WRIGHT,
INGOLF K. BOYESEN,
MICHAEL L. FREIBERGER,
Commissioners.

That said subscribers met at said time and place in said notice specified, and proceeded to elect directors, and that the following persons were duly elected for the term of one year as follows:

Henry Davis,
Frank Clifton,
Robert D. Fowler.

(Signed) JOSEPH WRIGHT,
INGOLF K. BOYESEN,
MICHAEL L. FREIBERGER,
Commissioners.

STATE OF ILLINOIS, } ss:
Cook County, }

On this 15th day of February, A. D. 1886, personally appeared before me, a notary public, in and for said county in said
174 State, Joseph Wright, Ingolf Boyesen and Michael L. Freiberger, and made oath that the foregoing oath by them subscribed is true in substance and in fact.

[SEAL.] (Signed) HENRY W. BOOTH,
Notary Public.

EXHIBIT 5.

I, Robert Stobo, secretary of the Davis Provision Company, do hereby certify that a special meeting of the stockholders of said company was held at the office of the company, room 60, Board of Trade building, Chicago, Illinois, on the 23d day of August, 1890, at the hour of 2 o'clock p. m., pursuant to the following notice:

"*Notice of Stockholders' Meeting.*

"CHICAGO, ILL., *July* 23, 1900.

"A special meeting of the stockholders of the Davis Provision Company will be held at the office of said company, 60 Board of Trade building, city of Chicago, State of Illinois, on the 23d day of August, 1890, at the hour of 2 o'clock in the afternoon of said day, to consider and vote upon the question of increasing the capital stock of said company from $25,000 to $100,000, pursuant to resolution of the directors of said company, at which meeting stockholders are requested to be present in person or by proxy.

"HENRY DAVIS,
"ANDERSON FOWLER,
"ROBERT STOBO, *Directors.*"

I do further certify that it appeared at said meeting that the said notice had been duly published for three successive weeks prior to said meeting in a newspaper published in Chicago, Illinois, and that the notices of said meeting were addressed and mailed to each
175 of the stockholders of said company at least thirty days before the time fixed for such meeting as required by law; that there were present and represented at said meeting, in person or by proxy, three hundred and thirty-three shares out of five hundred shares of the capital stock of said company; that, by votes representing more than two-thirds of all the stock of the company, it was resolved that the capital stock of said corporation be increased from twenty-five thousand dollars to one hundred thousand dollars; and that the proper officers and directors of said company were directed to take such further steps as might be necessary to issue the additional $75,000 of stock and to fully accomplish said increase of stock.

Witness my hand and the seal of said company this eighteenth day of October, 1890.

[CORPORATE SEAL.] ROBERT STOBO,
Secretary of the Davis Provision Co.

STATE OF ILLINOIS, } ss:
Cook County, }

Henry Davis, being first duly sworn, deposes and says that he is the president of the Davis Provision Company; that he has read the foregoing certificate signed by Robert Stobo, secretary of the Davis Provision Company, and knows the contents thereof, and that the matters and things therein contained are true.

[SEAL.] L. DAVIS.

Subscribed and sworn to before me this 18th day of October, 1890.

JAS. W. HARRISON,
A Notary Public.

176 UNITED STATES OF AMERICA, } ss:
State of Illinois, }

OFFICE OF SECRETARY.

I, Isaac N. Pearson, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true copy of certificate of increase of capital stock of the Davis Provision Company. Filed October 23, 1890, the original of which is now on file in this office.

In witness whereof, I hereto set my hand and affix the great seal of State, at the city of Springfield, this 27th day of December, A. D. 1892.

[SEAL.]

I. N. PEARSON,
Secretary of State.

DEFENDANT'S EXHIBIT NO. 1, MARCH 21, 1901.

By-Laws.

SECTION 1. There shall be elected a board of directors to consist of three persons, who shall hold their offices respectively for the period of one year, and until their successors are elected and qualified. Such board shall exercise such powers and perform such duties as may be prescribed by law or provided for in the by-laws.

SECTION 2. The officers of the company shall be a president, a secretary and a treasurer, and such other officers as shall from time to time be provided for by the board of directors. The president, secretary and treasurer shall hold their offices for the term of one year, and until their successors are elected and qualified. The president shall be elected from among the number of the directors.

SECTION 3. The annual meeting of the stockholders of the company for the election of directors, and the transaction of such
177 other business as may be brought before them, shall be held at the general office of the company, in the city of Chicago, on the first Monday of June in each year, at the hour of three o'clock p. m. A notice of such meeting, signed by the secretary shall be mailed by him to the address of each stockholder, so far as he knows such addresses, at least five days before the day of such annual meeting.

SECTION 4. The annual meeting of the board of directors for the election of officers shall be held at the general office of the company, in the city of Chicago, on the day of the annual stockholders' meeting, and immediately after the adjournment of such meeting. If for any cause such meeting shall not be then held, the election of officers may be had at any subsequent regular or special meeting of the directors.

SECTION 5. A majority of the board of directors may call special meetings of the stockholders of the company, which meetings shall be held at the general office, at such time as shall be designated in the call, and in such case it shall be the duty of the Secretary of the company, at least five days before the time fixed for holding said

meeting, to mail to each stockholder entitled to vote a notice specifying the time and place of holding said meeting.

SECTION 6. Any member of the board of directors may be removed from his office at a special meeting of the stockholders called for the purpose by a vote of a majority of all the stock of the company.

SECTION 7. In case of the resignation or death of any member of the board of directors, the vacancy caused thereby shall be filled by the remaining dir[illegible]ors if they can agree unanimously upon a suitable person therefor. If they cannot so agree, such vacancy shall be filled by the election at a special meeting of the stockholders called for the purpose. Notice of such special meeting may be given to the stockholders, either by being delivered to the several
178 stockholders, personally, twenty-four hours before the day for holding such meeting, or by mailing such notice to the address of the several stockholders, so far as the same are known to the secretary, five days before the day of such meeting. Such meeting may be called either by the president or by any two members of the board of directors.

SECTION 8. At any regular or special meeting of the stockholders each stockholder may vote the number of shares of stock owned by him, either in person or by proxy, duly authorized in writing.

SECTION 9. The board of directors shall hold their regular meetings at the general office of the company, in Chicago, on the first Monday in each month, at the hour of four o'clock p. m. A majority of the board shall constitute a quorum for the transaction of all business, and in case there should be no quorum present on the day and hour of any regular meeting, the members present may adjourn the meeting from time to time until a quorum be obtained, or may adjourn said meeting *sine die*.

SECTION 10. Either the president or secretary of the company may call special meetings of the board of directors whenever he shall deem it expedient to do so; and it shall be the duty of either of said officers to call special meetings of the board whenever two directors of the company shall request him so to do, and shall state the object of such meeting; in the case of the failure or neglect of the president or secretary, the said two directors may call the same.

SECTION 11. Any officer may be removed by the board of directors at any meeting, either general or special, and other persons elected to fill vacancies so caused.

SECTION 12. The president shall preside over all meetings of the board of directors at which he shall be present. In the absence of the president the board may elect a chairman *pro tem*.

179 SECTION 13. It shall be the duty of the president, subject to the control of the board of directors, to exercise a general supervision over the entire business of the company and over all of its property.

SECTION 14. Notes, drafts, acceptances, bills of exchange, and other instruments in writing excepting bank checks, and excepting, also, as hereinafter provided in section 17 of these by-laws, shall be signed

by the president and the treasurer of this company, and it shall be the duty of such officers to report to the secretary the fact of their having signed any such note, draft, acceptance, bill of exchange or other instrument in writing, and the secretary shall keep a faithful record of the same, and make a report thereof to the board of directors at their next meeting.

SECTION 15. The secretary shall attend all meetings of the stockholders, and of the board of directors, whether regular or special; he shall keep in a book prepared for the purpose a true and fair record of the proceedings of all meetings, and shall have charge of all books, documents and papers which properly belong to his office.

He shall have the custody of the corporate seal and shall attach the same to all documents which require sealing and which have been executed by the president.

All books, documents and papers belonging to the company shall at all times be open to the inspection of any director or stockholder of the company.

SECTION 16. The treasurer shall act as general financial agent of the company; he shall keep the moneys of the company on deposit with such banks or bankers as may be designated by the board of directors; he shall have power to draw and sign checks thereon, and he shall be required to sign all stock certificates; he shall keep all bank accounts in the name of the company and see that all books of account are kept in proper form and correctly, and will, in all cases, should he discover any delinquency in the accounts of any
180 officer, at once report the facts concerning such delinquency, and the name of the delinquent, to the president and board of directors.

He shall cause all vouchers and orders paid by him to be filed and properly preserved; he shall furnish the board of directors, at their regular meetings, a detailed statement of the receipts and expenditures of the company for the period since the former meeting, and his books and papers shall be at all times open to the inspection of the president and board of directors.

SECTION 17. In the absence of the treasurer from Albany and Plattsburgh, the president shall have power to draw and sign bank checks in the name of the company, on such bank or banks as are the depositaries of the company's moneys, which checks shall not be valid unless countersigned by some person who shall be designated by the treasurer to represent him in such absence. The president shall also have power to draw drafts on parties for payments due for goods sold them, and also to indorse notes for discount received from parties in payment for goods. He shall also act as general manager for the company at Albany and Plattsburgh.

For all services rendered the company as president and as general manager he shall be allowed a salary of twenty-five hundred dollars per annum.

SECTION 18. It shall be the duty of the president, secretary and treasurer to make the board of directors full reports of all matters pertaining to their respective offices annually, and the board of

directors may require of any officer of the company at any time to make full or special reports in their discretion touching the business of his office.

SECTION 19. These by-laws, or any of them, may be altered, amended or repealed at any regular or special meeting of the board of directors by a majority of the board.

181 DEFENDANT'S EXHIBIT No. 2, MARCH 21, 1901.

(Page 53.)

The adjourned annual meeting of the stockholders of the Davis Provision Company was held at room 60 Board of Trade building, Chicago, on Tuesday the 6th day of June, 1893, at 11.30 o'clock a. m.

Present:

Anderson Fowler, representing in person.....	336 shares.
Henry Davis, representing in person and by proxy.....	417 shares.
Frank E. Smith, representing in person and by proxy..	340 shares.
Robert Stobo, representing in person.....	1 share.
Total stock represented.....	1,094 shares,

being a majority of the stock of the company.

Mr. Frank E. Smith in the chair; Robert Stobo acting as secretary *pro tem.*

Mr. Fowler moved that Messrs. Henry Davis, Robert Stobo and Smith M. Weed be elected directors for the ensuing year and until their successors be duly elected and qualified, and that the secretary be instructed to cast a ballot of all the shares of stock present. Mr. Davis seconded this motion, which was unanimously carried.

The secretary having cast the ballot reported that the total shares represented at the meeting were cast in favor of the gentlemen named. Henry Davis, Robert Stobo and Smith M. Weed were thereupon declared the duly-elected directors of the company for the ensuing year and until their successors are duly elected and qualified.

On motion the meeting adjourned.

ROBERT STOBO,
Sec'y pro Tem.

182 DEFENDANT'S EXHIBIT No. 3, MARCH 21, 1901.

(Page 55.)

The adjourned annual meeting of the directors of the Davis Provision Company was held at room 60 of Trade building, Chicago, on Wednesday, the 7th day of June, 1893, at 9 o'clock a. m.

Present: Henry Davis, Smith M. Weed, Robert Stobo.

Mr. Weed was appointed chairman of the meeting; Mr. Stobo acting as secretary *pro tem.*

Mr. Stobo moved that Mr. Davis be elected president and treasurer for the ensuing year. Mr. Weed seconded this motion, which was unanimously carried.

Mr. Weed moved that Mr. Stobo be re-elected secretary for the ensuing year. Mr. Davis seconded the motion, which was unanimously carried.

Mr. Stobo moved that section 2 of the by-laws be amended to read as follows:

The officers of the company shall be a president, a vice-president, a secretary and treasurer, and such other officers as shall from time to time be provided for by the board of directors. The president, vice-president, secretary and treasurer shall hold their offices for the term of one year, and until their successors are elected and qualified. The president shall be elected from among the number of the directors. Mr. Weed seconded this motion, which was unanimously carried.

Mr. Stobo moved that the following section be added to the by-laws, to be known as section 20, viz.:

The vice-president, in the absence or incapacity of the president, shall possess all the powers and be subject to all the duties conferred or imposed upon the president by the by-laws of this company
183 or resolutions of the board. Mr. Weed seconded this motion, which was unanimously carried.

Mr. Davis moved that Mr. Smith M. Weed be elected vice-president for the ensuing year. Mr. Stobo seconded this motion, which was unanimously carried.

Mr. Weed read the following resolution, viz.:

Resolved, That a complete copy of the records (minute book) of this company be made from its organization to this date and certified by the secretary, and that hereafter copies of the minutes of all meetings held at Chicago be furnished, duly certified by the secretary; and that they, with the foregoing copy, be kept in a book for that purpose, in New York or Plattsburgh, as the president may see fit; that should any meetings of this company be held at Plattsburgh or New York a secretary *pro tem.* of such meeting shall furnish the secretary of the company a certified copy thereof, to the end that a complete record may be kept in Chicago, and a complete record in New York or Plattsburgh. This resolution was unanimously adopted.

On motion, the meeting adjourned.

ROBERT STOBO,
Sec'y pro Tem.

DEFENDANT'S EXHIBIT No. 4, MARCH 21, 1901.

A meeting of the board of directors of the Davis Provision Company, held this second day of December, 1893, at room 60, Board of Trade building, Chicago, Illinois.

Present: All the directors, Messrs. Henry Davis, Smith M. Weed and Robert Stobo.

The president called the meeting to order, and the secretary, Robert Stobo, read the following call for the meeting:

184 "In pursuance of the by-laws of the Davis Provision Company, the president of said company, the undersigned Henry Davis, deems it expedient that a special meeting of the board of directors of this company be held and he hereby calls a special meeting of the board to meet at once.—All the directors being present at the general office of the company in Chicago."

"Dec. 2d, 1893.

(Signed) HENRY DAVIS."

The secretary, Mr. Stobo, now got the minute book and presented it.

Mr. Weed stated to Mr. Stobo that under existing circumstances, the secretary ought to be changed and gave his reasons. Mr. Stobo then said that he thought it would be better for the board to remove him from office, than for him to resign, and looked over the company by-laws to see the power of the board in the premises.

Mr. Weed offered the following resolution:

Whereas, Robert Stobo, Esq., the secretary of this company is interested in or employed by the Anglo-American Provision Company and Fowler Brothers, and these companies are hostile to the interests of this company; it is therefore

"Resolved, That it is for the best interest of this company, that Robert Stobo be and he is hereby removed from the office of secretary of this company, and he is hereby directed to hand over the seal, books, records and papers of this company to his successor."

The passage of the resolution having been duly moved and seconded, Mr. Stobo first said he would protest against its passage, and then said he would say nothing and left the room.

The resolution was now put to the meeting and duly declared carried.

185 Mr. Weed now moved the passage of the following resolution:

"Resolved, That Michael L. Freiberger of Howland block, Chicago, Illinois, be and he is hereby elected secretary of this company in place of Robert Stobo removed, and that he be and he is hereby authorized and directed to demand and receive from Robert Stobo, the late secretary, the seal, books, records and papers of this company."

Its passage having been duly seconded, it was put to the meeting and carried.

Michael L. Freiberger now appeared and accepted the office of secretary.

HENRY DAVIS, *President.*

Mr. Weed now moved the passage of the following resolution:

"Resolved, That the general office of this company be established at room 8, Howland block, Chicago, Illinois."

The passage of said resolution having been duly seconded it was put to the meeting and carried.

Mr. Weed now offered and moved the passage of the following resolution:

"Whereas, on the 24th day of June, 1891, there was entered upon the minutes of the board of directors of this company, a resolution, etc., of which the following is a copy:

"'Mr. Fowler moved that the claims by the Davis Provision Company on the Anglo-American Provision Company for allowances on old mess pork, should be abandoned, seeing that it was purchased as contract pork, and was shipped just as received. Mr. Stobo seconded this motion. Mr. Davis stated that he understood he had bought the Anglo brand of pork. Mr. Fowler said that
186 was a mistake, as Mr. Davis had bought contract pork only, and not the Anglo brand. The motion being put was carried, Mr. Davis dissenting.

"'After consideration and discussion on the subject of the accounts and claims, it was

"'Agreed, that the claims up to this date are settled by the Anglo-American Provision Company allowing the Davis Provision Company $1,803.70. The Davis Provision Company sells to the Anglo-American Provision Company the forty-five tierces rib bellies now in Chicago at five and half cents per pound. The Davis Provision Company give their acceptance to the Anglo-American Provision Company for the balance now due at thirty, sixty and ninety days, in equal proportions,' which was adopted by the votes of Anderson Fowler and Robert Stobo, two out of the three directors of this company; Henry Davis, the other director, voting against said resolution and protesting against its passage:

"And whereas, Anderson Fowler was the president and manager of, and he and said Robert Stobo were at that time interested in, and employed by, the Anglo-American Provision Company and by Fowler Brothers, who were the parties interested in the account which said resolution pretended to adjust.

"And whereas, said resolution operated as a fraud upon this company and was in violation of its rights and against its interests, and on the part of said Directors Fowler and Stobo, it was a violation of their duty to this company as directors and trustees thereof, and thereby released or pretended and attempted to release said Anglo-American Provision Company and said Fowler Brothers from large and just claims of this company without consideration or right; it is therefore

"Resolved, That the said resolution above set forth be and the same is hereby reconsidered, rescinded and annulled."

187 The foregoing resolution having been duly seconded, was put to the meeting and duly passed and carried.

Mr. Weed now moved the passage of the following, which was duly seconded and put to the meeting:

"Resolved, That the president of this company be and he is hereby authorized and directed to proceed to collect and to sue and recover from the Anglo-American Provision Company and Fowler Brothers, all sums, claims and accounts that either of said companies may be indebted to this company for."

Which resolution was duly put to the meeting and carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Resolved, That the president of this company is hereby authorized and directed to prosecute in behalf of this company, Anderson Fowler, personally, for his fraudulent, corrupt and improper acts while acting as the president and as a director of this company, for damages and for all other claims against him due the company."

Said resolution having been duly put to the meeting was carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Resolved, That the president of this company be and he is hereby authorized to employ such attorney or attorneys as he may see fit, to prosecute any and all claims and suits against the Anglo-American Provision Company, Fowler Brothers and Anderson Fowler; and the president is also authorized to transfer and assign any and all of such claims or causes of action, if in his judgment he deems it for the best interests of this company so to do, and further

188 "Resolved, That the employment of any and all attorneys in this matter so far, by said president, is hereby ratified and confirmed."

Said resolution having been duly put to the meeting was carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Resolved, That all matters relating to any and all claims, disputes, settlements and litigations between this company and the Anglo-American Provision Company, Fowler Brothers or Anderson Fowler, and everything connected therewith be and the same is hereby referred to the president and the vice-president, with full power and authority."

Said resolution having been duly put to the meeting was carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Resolved, That the president of this company, be and he is hereby authorized to consent for this company, as a stockholder in the Plattsburgh Milling Company, to the execution of a mortgage by said milling company upon its property, for such an amount and upon such terms as said president may decide."

Said resolution having been duly put to the meeting was carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Whereas, at a meeting of the board of directors of this company, heretofore duly called and held in the city of New York, authority was given the proper officers of this company to convey to the Plattsburgh Milling Company, the grist mill property at Plattsburgh, known as Williams' mill, and then owned by this company,
189 and to take therefor for this company, stock in the Plattsburgh Milling Company.

"And whereas, there is no record of such meeting in the minute or record book of this company, although the proper minutes of said meeting, duly certified, were sent Robert Stobo, the then secretary of this company, it is therefore

"Resolved, That the said Robert Stobo, be respectfully requested to make search for such minutes and deliver the same to the secretary of this company; and the secretary of this company is hereby authorized and directed to enter such minutes upon the records of this company as of the date when such meeting was held."

Said resolution having been duly put to the meeting, was carried.

Mr. Weed now offered the following resolution, which was duly seconded:

"Resolved, That as the minutes of said meeting so held in the city of New York, cannot be found, then and in that case it is hereby resolved, that the conveyance of the Williams grist mill property to the Plattsburgh Milling Company, be and the same is hereby ratified and confirmed, and the acts of the president and the officers of this company in connection therewith, are hereby fully ratified and confirmed in every particular."

Said resolution having been duly put to the meeting, was carried.

Mr. Weed now offered the following resolution which was duly seconded:

"Resolved, That the by-laws of this company be amended by adding a section thereto, which shall read as follows:

"SECTION A. The board of directors may, whenever they
190 deem it expedient, appoint an executive committee of two, who shall have the general management of the business of the company, subject to the control of the board of directors. Such executive committee may hold their meetings at such place or places in the State of Illinois or out of it as the business of the company may require. The said executive committee shall be required to keep minutes of the proceedings of all its meetings, which shall be signed by the president and delivered to the secretary, and by him placed in the minute or record book of this company."

Which resolution was put to the meeting, and having received the unanimous vote of all the directors present was duly declared carried.

Mr. Weed now moved that the board of directors now proceed to appoint an executive committee under the authority of the section of the by-laws just adopted, carried.

It was now moved and seconded that the president and vice-

president of this company be appointed and now are appointed to act as the executive committee of this company, under section A of the by-laws of this company, which motion having been duly put to the meeting was carried.

Mr. Weed now offered the following resolution, which was duly seconded:

"Resolved, That in case of the refusal of Robert Stobo, the late secretary of this company, to deliver the company's seal, records, papers, and books to the secretary of this company, the said secretary is hereby authorized and directed to institute and prosecute any and all suit or suits or legal proceedings to recover and gain possession thereof for the company."

Which resolution having been duly put to the meeting was carried.

It was now moved and seconded that when this meeting
191 adjourn, it adjourn to meet or convene again at three o'clock in the afternoon of Saturday, the 16th day of December, 1893, at the office of the Davis Provision Company in Plattsburgh, New York. Carried.

On motion, the meeting now adjourned.

MICHAEL L. FREIBERGER, *Secretary.*

COMPLAINANT'S EXHIBIT No. 1.

Placita.

Pleas in the circuit court of the United States for the northern division of the northern district of Illinois, begun and held in the United States courtroom, in the city of Chicago, in said district, before the Honorable Peter S. Grosscup, judge of the United States district court for the northern district of Illinois, on Thursday, the 27th day of May, A. D. 1897, being one of the days of the December term of said court, 1896, and of our Independence the 121st year.

J. W. ARNOLD,
U. S. Marshal.
S. W. BURNHAM, *Clerk.*

Be it remembered that on this day, to wit, the 27th day of May, A. D. 1897, there was filed in the office of the clerk of said court the bill of complaint of Smith M. Weed, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois.

To the honorable the judges of the circuit court of the United States for the northern district of Illinois:

Smith M. Weed, of Plattsburgh, New York, a citizen of the
192 State of New York, and a resident of the northern district of New York, on behalf of himself, and all other creditors and stockholders of The Davis Provision Company, defendant herein, brings this, his bill of complaint, against the Davis Provision Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of said State of Illinois.

And, therefore, your orator complains and says:

I. That your orator is and at the time of the beginning of this suit was a citizen of the State of New York, and a resident of Plattsburgh, in the northern district of New York, and is, and at said time was, a stockholder in the defendant The Davis Provision Company, owning one hundred shares of its capital stock of the par value of fifty dollars each.

II. That the defendant, The Davis Provision Company, is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Illinois, having been organized as such under the general law of said State on January —, 1886.

The purpose for which the said corporation was formed was to buy and sell meats, grain and provisions, and to carry on a general wholesale provision business at Chicago, in the State of Illinois, and at Plattsburgh and Albany in the State of New York, its principal office being at Chicago, in the State of Illinois, and its office in the State of New York, being at Plattsburgh, in the northern district of New York. The capital stock of said company was originally fixed at twenty-five thousand dollars, but was subsequently, and in accordance with the laws of Illinois, increased to one hundred thousand dollars, of which amount seventy-one thousand five hundred dollars has been actually subscribed and paid to said corporation. That your orator is, and since June, 1893, has been one of the directors of defendant.

III. That said defendant since its organization has been en-
193 gaged in the business for which it was organized and has acquired, and now has, property and assets belonging to it, and situated in different States, to wit, in Illinois, New York and Vermont.

IV. That in the course of the business of said defendant, it has contracted debts and issued commercial paper to a large amount; that a note for five thousand dollars ($5,000.00) made by one John Farnsworth, and which was indorsed by this complainant for the accommodation of defendant, came due on May 22d, 1895, but has

not been paid, and that other notes and obligations of the defendant to a large amount will come due within the next four days, all of which the said defendant is without funds to pay, and in the present condition of its affairs, it is not practicable for it to raise money so that it will be unable to pay its obligations at maturity, and it is actually insolvent, and is, and will be wholly unable to continue the business for which it was organized.

V. That the defendant has assets and tangible personal property in the State of New York to a large amount, consisting mainly of meats and provisions, which property together with the debts due to said defendant from debtors residing in the State of New York, make up the largest part of the assets of defendant, and is liable to attachment by the creditors of defendant, it being a foreign corporation, as regards the State of New York, so that unless a receiver of defendant be appointed for the equal benefit and protection of all creditors, preferences will be obtained by those of its creditors whose claims first mature, to the great loss and prejudice of this complainant and all other creditors and stockholders, and many actions at law will thereby be rendered necessary.

VI. That your orator is liable, as an indorser for the defendant, upon two notes of five thousand dollars each, one of which comes due on May 22d, 1895, and has been protested, and the other of which will become due on ——.

VII. That by the laws of the State of New York, all prop-
194 erty, real or personal, belonging to a foreign corporation including debts due from residents of the State, is liable to attachment, at the suit of creditors of such corporation.

VIII. Inasmuch, therefore, as your orator has no adequate remedy at law, and can only have relief in equity, he files this bill of complaint on behalf of himself, and all others similarly situated, and prays as follows:

(1.) That the process of subpœna may issue against the said defendant The Davis Provision Company, commanding it to appear in this court and answer this bill of complaint.

(2.) That the court will administer the entire assets of the defendant.

(3.) That the court will forthwith appoint a receiver of all the property and assets of the defendant The Davis Provision Company wherever the same may be situated, and that the said defendant and its officers and agents be required to immediately deliver up to such receiver all of said assets and property, and all books of accounts, papers and documents relating thereto, and that said defendant, its directors, officers and agents, be enjoined and restrained from interfering in any way with the custody and possession of said receiver, and from further acting by or in behalf of said corporation.

(4.) That each and every of the creditors of said defendant be enjoined and restrained from interfering with the property or assets of said defendant.

(5.) That the defendant may be adjudged to be dissolved.

(6.) That the complainant may have such other or further order or relief, or both, as may be just and equitable.

SMITH M. WEED,
By JOSEPH WRIGHT,
His Solicitor.
JOSEPH WRIGHT,
Solicitor and of Counsel.

195 STATE OF NEW YORK, } ss:
City and County of New York, }

Smith M. Weed, being duly sworn, says:

I am the complainant above named; I have read the foregoing bill of complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein alleged to be stated on information and belief, and as to those matters I believe it to be true.

SMITH M. WEED.

Sworn to before me this 24th day of May, 1895.
[SEAL.] FRANK WALLING,
Notary Public, N. Y. Co.

STATE OF NEW YORK, } ss:
City and County of New York, }

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court for said city and county, the same being a court of record, do hereby certify that Frank Walling, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 25th day of May, 1895.
[SEAL.] HENRY D. PURROY, *Clerk.*

196 SOUTHERN DISTRICT OF NEW YORK, } ss:
Clinton County, New York, }

Henry Davis, being sworn, says:

I. I am president of The Davis Provision Company, the defendant in the above entitled suit. Said company is a corporation, incorporated, organized and existing under and by virtue of the laws of the State of Illinois, and was so incorporated on or about January, 1886. The principal office of the said corporation is at Chicago, Illinois, and it has, and even since its organization has had, an office for the transaction of business at Plattsburgh, in the northern district of the State of New York.

II. The business of the said corporation is buying and selling

meats, grains and provisions, and generally carrying on a wholesale provision business.

III. In the course of such business the said corporation had contracted debts to a large amount, and now has outstanding notes, drafts and other commercial paper on which it is liable to the amount of about $58,000, and it is also indebted upon book accounts to the amount of about $56,000.

IV. A considerable amount of its said obligations is now due, or just about to become due, and certain notes upon which it is liable, either as maker or indorser, are now due and unpaid and held by the parties owning them under protest, to wit, a note made by John Farnsworth for $5,000, indorsed by the Davis Provision Company, which came due on May 22, 1895; two notes made by S. X. Metzger & Sons, each for $1,973.41, indorsed by said company, which came due on May —, 1895, respectively. I have been notified by Metzger & Sons that they will not be able to pay the said notes at maturity. The entire amount of the indebtedness of said defendant corporation amounting, as above stated, to upwards of $100,000, will shortly become due and payable.

197 V. The defendant The Davis Provision Company has no money or funds on hand available for the payment of its said maturing obligations, and although it has a large amount of assets and property, the same are so situated and of such character that it is not practicable to raise money thereon to the necessary amount, and it will be wholly unable to meet its said maturing obligations.

VI. The assets and property of the said provision company are substantially as follows:

Open accounts, about	$90,000 00
Merchandise on hand, estimated at about	38,000 00
Bills receivable	5,000 00
Stock in the Plattsburgh Milling Company and in the Plattsburgh Supply Company, amounting to, at par value	54,800 00
Other assets, such as furniture, fixtures and cash on hand, to the amount of about	3,000 00
	$190,800 00

That of the said $90,000 of open accounts a large amount, to wit, upwards of $40,000, is owing by insolvent debtors or disputed and in litigation. That the stock of the two corporations above mentioned is of uncertain value and not readily salable, and has been pledged by the said Davis Provision Company as collateral to certain of its obligations.

VII. The authorized capital stock of the said corporation, the Davis Provision Company, is the sum of $100,000, upon which $71,500 has been subscribed and paid for, and the balance of its stock has not been issued or subscribed for, so that it is not in a

position to call upon its stockholders for money on account of its capital.

VII. All of the merchandise belonging to the said com-
198 pany, consisting of its stock of meats and provisions, is situated in the State of New York, and the largest part of the moneys due to it upon open accounts is due from debtors residing in the State of New York, so that substantially the entire amount of its assets is liable to attachment at the suit of its creditors, the said company being a foreign corporation.

IX. The credit of the said corporation with the different banks at which it does business is much impaired, and it is not possible for it to borrow money without ample collateral, and it has no assets available for such purpose.

X. The entire amount of its tangible personal property, if sold on execution in favor of its creditors, would pay but a small proportion of its existing debts, and the debts and things in action due to it will require time and careful management to realize.

XI. It is not possible for the said company longer to carry on the business for which it was organized, and it is now insolvent.

XII. I am the owner of 366 shares of the capital stock of said company, of the par value of $18,300.

HENRY DAVIS.

Sworn to before me this 24th day of May, 1895.
[SEAL.] W. W. CANTWELL,
Notary Public.

STATE OF NEW YORK, } ss:
Clinton County Clerk's Office, }

I, Harrison A. Wood, clerk of said county and of the courts of record thereof, do hereby certify that W. W. Cantwell, before whom the foregoing affidavit was made, and who has thereto signed his name, was at the time of so doing a notary public in and for said county, duly elected or appointed and sworn; that his official
199 acts as such are entitled to full faith and credit. And further that I am well acquainted with the handwriting of the said notary public, and verily believe the signature thereto to be genuine.

In witness whereof, I have hereunto set my hand and official seal, this 24th day of May, 1895.
[SEAL.] H. A. WOOD, *Clerk*,
By J. N. LANDRY, *Dep.*

Indorsed: Filed, May 27, 1895, S. W. Burnham, clerk.

And afterward, to wit, on the 7th day of September, A. D. 1895, there was filed in the office of the clerk of said court the preliminary report and inventory of Chicago Title and Trust Company, receiver, which report and a portion of Exhibit "B" thereto attached, is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois.

In the Circuit Court of the United States for the Northern District of Illinois.

SMITH M. WEED
vs.
DAVIS PROVISION COMPANY. } In Chancery.

To the Honorable James G. Jenkins, circuit judge:

The report of the Chicago Title and Trust Company, receiver herein, respectfully represents that on the 27th day of May, 1895, the undersigned was, by the honorable circuit court of the
200 United States in and for said northern district of Illinois, duly appointed receiver of the defendant, said Davis Provision Company, and of all the property and assets of said defendant of every kind and nature and wherever situated, with all the usual powers of receivers in equity, as by reference to said order entered of record in said circuit court will more fully appear.

Said receiver further represents that it at once complied with the conditions of its appointment by filing its acceptance of such appointment with the clerk of said circuit court.

Said receiver further reports that no assets, books, papers or accounts have come to its hands as such receiver; that the undersigned is informed that by far the larger part, if not substantially all, the assets of said Davis Provision Company are located in Plattsburgh in the State of New York, and that at said Plattsburgh in the State of New York, on the 27th day of May, 1895, at a special term of the supreme court of the State of New York, held at the city of Troy, Rensselaer county, New York, in the suit of Smith M. Weed, plaintiff against Davis Provision Company, an order was duly entered in said court appointing John M. Wever and David F. Dobie of Plattsburgh, New York, receivers of said Davis Provision Company and its property and assets ancillary to the undersigned appointed in Illinois, with full power and authority to administer the assets of said defendant in the State of New York, and to take charge of, receive and apply the same among the creditors of said corporation under the direction of said supreme court, upon qualifying; a copy of which appointment is hereto attached and marked Exhibit "A;" that on application of the undersigned to said receivers appointed in New York, said New York receivers prepared and furnished to the undersigned an inventory of the assets of the Davis Provision Company, including stock and accounts receivable due said Davis Provision Company, located at Plattsburgh in the State of New York; a copy of which inventory is hereto attached
201 and marked Exhibit "B." The undersigned therefore files the same as an inventory of all the property and effects that *has* come to its knowledge, belonging to the Davis Provision Com-

pany, in compliance with the order of court entered herein requiring it to file such inventory.

All of which is respectfully submitted.

CHICAGO TITLE AND TRUST COMPANY, *Receiver.*
DAVIS PROVISION COMPANY,
By HENRY W. LEMAN,
2d Vice-President.

(Here follows Exhibits "A" and "B." Exhibit "A" not copied.)
(The following are last three pages of Exhibit "B.")

The following suits are now pending, and the value of the assets cannot be determined until the suits are terminated, viz.:

N. Y. Supreme Court, Clinton County.

THE DAVIS PROVISION COMPANY, Plaintiff, *against* FOWLER BROTHERS, LIMITED, and ANGLO-American Provision Company, Defendants. — Action No. 1. For $25,229.77.

SAME *against* SAME. — Action No. 2. For $3,433.24.

202 U. S. Circuit Court, Northern District of New York.

THE DAVIS PROVISION COMPANY, Plaintiff, *against* FOWLER BROTHERS, LIMITED, Defendant. — Action for $4,252.38.

N. Y. Supreme Court, Clinton County.

MARK J. DAVIS, Plaintiff, *against* FOWLER BROTHERS, LIMITED, and ANGLO-American Provision Company, Defendants. — Action for $7,956.76.

U. S. Circuit Court, Southern District of New York.

THE DAVIS PROVISION COMPANY, Plaintiff, *against* ANDERSON FOWLER, Defendant. — Action for $35,000.

HENRY DAVIS, Plaintiff, *against* ANDERSON FOWLER, Defendant. — Action for $10,000.

203 *Recapitulation.*

Cellar, room 1	$430 60
" " 2	306 18
" " 3	5,589 64

First floor, small room	2,992 68
" " large room	9,750 43
" " little room off back office	12 40
Second floor, room 2	824 19
" " " 3	363 96
" " " 6	390 70
" " " 7	251 95
" " " 11	564 00
" " " 10	1,756 09
Top floor	104 08
Store-house	10,028 33
Accounts due Davis Provision Company	14,310 01
Office, furniture and fixtures, tools, appliances, etc	145 50
Plattsburgh Milling Company stock	49,800 00
Accounts due Davis Provision Company (unencumbered)	16,377 74
Amounts claimed in suits now pending, the value of which cannot be determined until suits are terminated	85,872 15
	$199,870 65

(Signed) D. F. DOBIE,
JOHN M. WEVER,
Ancillary Receivers in N. Y. State,
By WEEDS, SMITH & CONWAYS,
Their Attorneys.

Indorsed: Filed Sept. 7, 1895, S. W. Burnham, clerk.

204 NORTHERN DISTRICT OF ILLINOIS, }
Northern Division. }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be true and complete copies of the bill of complaint filed in said court on the 27th day of May, A. D. 1895, and receiver's preliminary report, and a portion of Exhibit B attached to said report, filed in said court on the 7th day of September, A. D. 1895, in the cause wherein Smith M. Weed is complainant, and Davis Provision Company is defendant, as the same appear from the originals, now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 2d day of April, A. D. 1901.

[SEAL.] S. W. BURNHAM, *Clerk.*

205 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY
vs.
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator, etc., and American Surety Company.

Final Hearing in Equity.

The complainant recovered a judgment against the defendant, The Davis Provision Company, in the circuit court of Illinois on the 6th day of January, 1899, for the sum of $5,049.

The defendant, The Davis Provision Company, recovered a judgment against the complainant on the 13th day of December, 1895, in the supreme court of New York, for the sum of $9,241, which judgment was subsequently modified and affirmed and final judgment was entered for $9,678 on the 16th day of July, 1900. The cause of action in the Illinois suit might have been counterclaimed in the New York suit and *vice versa*.

The complainant seeks to have the first of these judgments set off, *pro tanto*, against the second.

Both of these corporations were organized under the laws of Illinois. The Davis Provision Company is insolvent, having no substantial assets of any kind.

The case was before this court upon demurrer to the bill
206 (105 Fed. Rep., 536), where it was held that such an action might be maintained. Various defenses are alleged in the answer, but at the argument the only two relied on were as follows:

First. That by virtue of an agreement made October 23, 1893, the various choses in action which culminated in the judgment of $9,678, were, on the 27th day of May, 1895, for a valuable consideration, assigned to the defendant Smith M. Weed.

Second. That the complainant has been guilty of laches in not setting up the cause of action upon which the Illinois judgment was obtained as a counterclaim in the New York action.

Henry Wilson Bridges, for complainant.
Frank E. Smith, for defendants.

COXE, *J.*:

Since the decision on the demurrer the question of jurisdiction is no longer an open one in this court.

The first question now to be decided is whether the judgment recovered in the name of the Davis Provision Company belongs to that company or to the defendant Smith M. Weed.

The following facts seem to be established:

In December, 1892, the Davis Company gave the Anglo-Company three notes, aggregating $23,546, in settlement of its account, which

notes were transferred to Fowler Brothers Limited, an Eng-
207 lish corporation, having the same interests and being identical with the Anglo Company so far as the transactions in controversy are concerned. In October, 1893, a judgment for about $19,000 was recovered against the Davis Company on the notes. In order to pay this judgment it was necessary to borrow $13,500 from the Plattsburgh bank. The bank agreed to loan the money provided the defendant Smith M. Weed would indorse the paper, the Davis Company to give him as security the claims against the Anglo Company and certain stock which turned out to be worthless. The proceeds of the discount then made paid the Fowler judgment and was, practically, a payment to the Anglo Company. There is still owing the bank on account of this loan about $10,000 on renewal notes made or indorsed by the defendant Weed. The loan of $13,500 was negotiated by Henry Davis the president, treasurer and general manager of the Davis Company who, in doing so, was acting within the scope of his authority.

The court is unable to find any proof that the Davis Company was insolvent at the time of this discount or any direct proof that Weed knew at that time of the claims which were soon afterwards included in the Illinois suit.

On the 27th of May, 1895, during the pendency of the action which resulted in the $9,678 judgment, the Davis Company transferred, by written assignment, the claims in controversy to said Weed. Thereafter the action proceeded in the name of the original plaintiff, but this is permitted by the Code of Civil Procedure of New York, sec. 756.

208 The court has searched the record in vain for any evidence of fraudulent or collusive conduct on the part of the defendants in relation to the transfer of these claims. It is true that the business was informally and carelessly done, that the records of the Davis Company fail to disclose the transaction, that Weed was vice president of the company at the time and that there is evidence tending to show that the company exercised dominion over the claims after the assignment to Weed. But all this is insufficient to overthrow the positive proof that the assignment and the agreement therefore were in fact made. In order to reach a contrary conclusion the court most arbitrarily reject the uncontradicted testimony of a number of intelligent and unimpeached witnesses. This cannot be done.

If the transaction were one where a director has taken or concealed the property of the company for his own advantage to pay his antecedent debts or to prevent it from being reached by the creditors, a very different case would be presented. Here, on the contrary, the action of Weed in procuring $13,500 on his personal credit and paying it into the company's treasury was an act from which he could derive no personal benefit and which was likely to result, as in fact it has resulted, in pecuniary loss to him. It was not an act in hostility to the company and its interests, or the interests of its creditors, but was for the benefit of all of these. It was done

apparently in entire good faith to enable the company to pay its debts and continue in business. It was not an act in contem-
209 plation of insolvency, but to prevent insolvency. It was not done to cheat the creditors, but to pay them; certainly there could have been no purpose to defraud the complainant, for the money thus raised was paid directly to the complainant. In short, instead of being *ultra vires* and fraudulent it was a laudable and necessary act, the neglect of which would probably have resulted in the immediate failure of the Davis Company. It must, therefore, be held that the assignment of May 27, 1895, was the fulfillment of the agreement of October 23, 1893, and that it was a *bona fide* transaction. Barber *v.* Spencer, 11 Paige, 517, 518.

The judgment recovered in the supreme court of New York, December 13, 1895, and affirmed by the court of appeals July 16, 1900, though nominally in favor of the Davis Company was, therefore, actually in favor of Smith M. Weed against the Anglo Company.

The sequence of the important events is as follows:

Weed's agreement to sign notes for $13,500, with claims as security, was October 23, 1893.

The Anglo Company's Illinois action was commenced November 4, 1893.

The Davis Company's New York action was commenced June 12, 1894.

The written assignment to Weed was May 27, 1895.

The bill for a receiver of the Davis Company, Weed being complainant, was filed in Illinois May 27, 1895.

The judgment in the New York supreme court was entered December 13, 1895.

The judgment in Illinois was entered January 6, 1899.

210 The affirmance of the New York judgment was July 16, 1900.

The foregoing facts having been established the question remaining is whether the prayer of the bill can be granted, namely, that the judgment of the Anglo Company of January, 1899, be set off against the New York judgment of December, 1895, as affirmed in 1900.

The rule seems to be established in this State that the *bona fide* assignee of a judgment can collect it of the judgment debtor notwithstanding the fact that afterwards the latter recovers a judgment against the assignor. The second judgment cannot be set off against the first.

The law is thus stated in Prouty *vs.* Swift, 10 Hun., 232:

"As the right to set off judgments does not accrue until the judgment has been perfected, the *bona fide* assignment, previous to judgment, will cut off the right to have such judgment set off against the party in whose favor it was rendered."

Citing Perry *v.* Chester, 53 N. Y., 242; Mackey *v.* Mackey, 43 Barb., 58; Roberts *v.* Carter, 38 N. Y. 107.

It may be conceded that in October, 1893, when Weed acquired an equitable interest in the chose in action against the Anglo Company his interest was liable to be defeated by counterclaims properly asserted against the Davis Company. But no such claims were asserted although it is admitted that they might have been; had they been, Weed would have been given an opportunity to investigate and defeat them.

Moreover, no such claims are asserted now; they are
211 merged in the judgment which did not come into being until 1899—over five years after Weed's equities accrued.

Lowell *v.* Lane, 33 Barb., 292, and cases cited on page 295.

A court of equity will not ordinarily interfere with judgments at law or to enforce a set-off in favor of one who has had an opportunity to plead it as defence in an action at law and has voluntarily waived it there.

Hendrickson *v.* Hinckley, 17 How. U. S. 443; U. S. Bung Co. *v.* Armstrong, 33 Fed. Rep. 94.

The fact that the judgment creditor is insolvent does not alter the rule, in the absence of proof that the judgment debtor could not have set off his demand in the suit in which judgment was recovered against him.

Wolcott *v.* Jones, 86 Mass. (4 Allen), 367.

Assuming that Weed took the claims against the Anglo Company subject to all equities existing at the time of the transfer it is manifest that if the cause of action in the Illinois case was not then available as a counterclaim or a defense, the rights of Weed cannot be affected by anything occurring thereafter. In other words, the title of Weed cannot be destroyed because the claims assigned to him might have been defeated, if they had remained in the hands of the assignor, by defenses and counterclaims which did not arise or become available until after the date of the assignment. Hackett *v.* Connett, 2 Edwards Ch. 73.

Either the Anglo Company had a defense to the claims held by Weed or it did not. If it did have such a defence it should have asserted it.

212 No case has been cited by the complainant or found by the court where a set off has been permitted upon such facts as are here established.

It follows that the bill must be dismissed.

NOTE.—At the argument the counsel for the complainant asked for a stay pending an appeal in case the court should decide against him. The request seems reasonable.

(Endorsed:) United States circuit court, southern district of New York.—Anglo-American Provision Company, *vs.* Davis Provision Company, *et al.*—Decision, Coxe, J.—U. S. circuit court, southern district of New York, Filed Jan. 10, 1902, John A. Shields, clerk.

213 At a stated term of the United States circuit court for the southern district of New York, held at the post office building in the city of New York, on the 20th day of January, 1902.

Present: Hon. Alfred C. Coxe, district judge.

ANGLO-AMERICAN PROVISION COMPANY, Plaintiff,
against
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator of the Goods, Chattels, and Credits Which Were of Julius Davis, Deceased, and American Surety Company, Defendants.

This cause came on to be argued at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed that the bill of complaint be dismissed with costs to the defendants other than The American Surety Company, to be taxed by the clerk against the complainant.

ALFRED C. COXE, *U. S. J.*

(Endorsed:) United States circuit court, southern district of New York.—Anglo-American Provision Company, plaintiff against Davis Provision Company, *et al.* defendants.—Decree.—Smith, Conway & Weed, attorneys for defendants Davis Pro. Co. *et al.*—Office address, Coal & Iron exchange, 21 Cortlandt St. New York city.—Approved as to form. Weiser & Bridges.—U. S. circuit court, southern district of New York, Filed Jan. 20, 1902, John A. Shields, clerk.

214 United States Circuit Court, Southern District of New York.

ANGLO-AMERICAN PROVISION COMPANY, Appellant,
vs.
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator, etc., and American Surety Company, Appellees.

Petition for Appeal.

Comes now the Anglo-American Provision Company by Weiser & Bridges, its solicitors and files herein this its petition for appeal to the United States Supreme Court, together with its assignment of errors herein, in the words following, to wit:

The Anglo American Provision Company, complainant herein represents that the court has erred in the proceedings and in the decree in the above entitled cause, which errors have been designated and set forth in the assignment of errors which is filed herewith as part hereof.

Wherefore said Anglo American Provision Company prays an appeal to the United States Supreme Court and that a proper cita-

tion requiring as therein limited, the defendants, Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis as administrator etc., and American Surety Company to appear and show cause to said United States Supreme Court
215 why the decree in said cause should not be vacated and reversed.

Dated February 20th, 1902.

WEISER & BRIDGES,
Solicitors for Complainant-Appellant.

Appeal allowed and all proceedings stayed pending said appeal.

ALFRED C. COXE,
Acting Circuit Judge.

(Endorsed:) United States circuit court, southern district of New York.—Anglo American Provision Company, appellant, *vs.* Davis Provision Company, *et al.* appellees.—Petition for appeal.—Weiser & Bridges, solicitors for complainant—35 William St. New York city.—Copy received this 27th day of February, 1902. Smith, Conway & Weed, solicitors for appellee.—U. S. circuit court, southern district of New York, Filed Mar. 4, 1902, John A. Shields, clerk.

216 United States Circuit Court, Southern District of New York.

ANGLO AMERICAN PROVISION COMPANY, Appellant,
vs.
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, Henry Davis, as Administrator, etc., and American Surety Company, Appellees.

And now comes the complainant and appellant, The Anglo American Provision Company into court by its attorneys Weiser & Bridges, and says that in the record and proceedings herein there is manifest error in this to wit:

First. The court below erred in finding that the cause of action in the Illinois suit might have been counterclaimed in the New York suit and *vice versa*.

Second. The court below erred in finding "that in order to pay the judgment it was necessary to borrow $13,500 from the Plattsburgh national bank. The bank agreed to loan the money provided the defendant, Smith M. Weed, would endorse the paper, the Davis Company to give him as security the claims against the Anglo American Company a certain stock, that turned out to be worthless."

Third. The court below erred in not finding that there was no competent evidence whatever of any transaction between the defendant, Smith M. Weed and the Merchants' National Bank of

Plattsburgh, effecting the relations between the Anglo
217 American Provision Company and the Davis Provision Company as regards the subject matter of this action.

Fourth. The court erred in taking into consideration the testimony relating to the alleged transactions between the defendants Smith M. Weed, Davis Provision Company and The Merchants' National Bank of Plattsburgh alleged to have taken place during the year 1893 and in not holding that all such evidence was incompetent, irrelevant and immaterial and was not the best evidence but was all secondary evidence.

The specific testimony is contained in the record (fol. 316–327, 340) and is partly as follows: Questions addressed to the witness Henry Davis, president of the Davis Company.

Q. In 1893 did you make a loan in behalf of your company through the Merchants' National Bank of Plattsburgh of $13,500?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. What paper or obligation was given for the loan?

Same objections.

A. Three notes.

Q. Who were the parties to these notes?

Same objection, and that it is not the best evidence.

A. They were signed by myself and endorsed by Mr. Weed one note I think, and one note was signed by Mr. Weed and endorsed by me and were in favor of the Davis Provision Company (fols. 317–318).

218 Q. Will you look at the copies of the notes handed you and say if they are copies of the notes which you gave at the time you obtained the loan of $13,500?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir.

Fifth. The court below erred in holding that there was no "direct proof that Weed knew at that time of the claims which were afterwards included in the Illinois suit."

Sixth. The court below erred in not finding that it was a necessary presumption that Weed at that time knew all about the claims which were afterwards included in the Illinois suit.

Seventh. The court below erred in finding that "on the 27th day of May, 1895, during the pendency of the action which resulted in the $9,678 judgment, the Davis Company transferred by written assignment the claims in controversy to said Weed."

Eighth. The court below erred in not finding that there never was or never has been any valid assignment of any claims involved

in this proceeding by the Davis Provision Company to Smith M. Weed.

Ninth. The court below erred in finding that the "evidence that the company exercised dominion over the claims after the assignment to Weed" was "insufficient to overthrow the positive proof that the assignment and the agreement therefor were in fact made."

Tenth. The court below erred in not finding that the various
219 acts of dominion exercised by the said Davis Provision Company after October, 1893, and especially their setting up of the subject matter of the New York judgment in counter-claim to the action in Illinois out of which arose the judgment in suit was sufficient to invalidate any attempted assignment to the defendant Weed.

Eleventh. The court below erred in not finding that the written assignment made on the 27th day of May, 1895, was made during the insolvency of the said Davis Provision Company to convey its assets to its director and vice-president, and was presumptively fraudulent and void.

Twelfth. The court below erred in holding that "the action of Weed in procuring $13,500 on his own personal credit and paying it into the company's treasury was an act from which he could derive no personal benefit and which was likely to result as in fact it has resulted in pecuniary loss to him." That it was done in the interest of the creditors and in good faith, to enable the company to pay this debt; that it was done to prevent insolvency.

Thirteenth. The court below erred in holding "that the assignment of May 27th, 1895, was the fulfillment of the agreement of October 23rd, 1893, and that it was a *bona fide* transaction."

Fourteenth. The court below erred in holding "that the judgment recovered in the supreme court of New York, December 13th, 1895, and affirmed by the court of appeals, July 16th, 1900, which was nominally in favor of the Davis Company was actually in favor of Smith M. Weed against the Anglo American Provision Company."

220 Fifteenth. The court below erred in holding that it was the established rule "in this State that the *bona fide* assignee of a judgment can collect it of a judgment debtor notwithstanding the fact that afterwards the latter recovers a judgment against the assignor. The second judgment cannot be set off against the first."

Sixteenth. The court below erred in not finding that the *bona fide* assignee of the judgment cannot collect it of the judgment debtor where the judgment debtor has recovered a judgment against the assignor and the assignor was insolvent at the time of the assignment where the said judgment did not arise out of a judgment sounding in tort.

Seventeenth. The court below erred in holding, that though at the time "Weed acquired an equitable interest in the chose in action against the Anglo-American Provision Company, his interest was liable to be defeated by counter-claim properly asserted against the

Davis Company," still it was not defeated because no such claims were asserted and complainant is guilty of laches because it might have pleaded in set off in the New York action.

Eighteenth. The court below erred in dismissing the bill of complaint herein.

Nineteenth. The court below erred in not adjudging that the amount of the judgment obtained in the State of Illinois by said complainant against the said defendant, The Davis Company, be set off against and deducted from the amount of the judgment obtained in the State of New York by the said Davis Provision Company against the complainant herein and Fowler Brothers (Lim-
221 ited); that the defendant, The Davis Provision Company and its assigns, be forever enjoined from enforcing the judgment obtained in New York State by the said Davis Provision Company except for the excess of the amount of said New York judgment over and above the amount of the said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action; also that the defendant, The American Surety Company, be forever enjoined from paying over to the other defendants herein any sum or sums except the excess of said New York State judgment over said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action."

Wherefore, and for divers other errors in said record appearing, the complainant and appellant prays that the final decree appealed from be reversed and annulled, and that a decree be entered in favor of complainant and appellant and against the defendants and appellees as prayed for by the bill of complaint herein with costs.

WEISER & BRIDGES,
Solicitors for Complainant and Appellant.

(Endorsed:) United States circuit court, southern district of New York.—Anglo American Provision Company, appellant, *vs.* Davis Provision Company, *et al.* appellees.—Assignment of errors.—Weiser & Bridges, solicitors for complainant, 35 William St. New York city.—Presented Feb. 20th, 1902. A. C. Coxe, U. S. J.—U. S. circuit court, southern district of New York, Filed Feb. 21, 1902, John A. Shields, clerk.

222 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

ANGLO AMERICAN PROVISION COMPANY, Complainant-Appellant,
vs.
DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. Smith, Thomas F. Conway, George S. Weed, Merchants' National Bank of Plattsburgh, and Henry Davis, as Administrator, etc., Defendants-Appellees.

Bond for Damages and Costs.

Know all men by these presents, that, The City Trust Safe Deposit & Surety Company of Philadelphia, a corporation duly organized under the laws of the State of Pennsylvania, and having its principal office in the city of Philadelphia, but lawfully transacting business in the State of New York, and having an office at No. 160 Broadway, New York city, State of New York, is held and firmly bound unto the above-named Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants National Bank of Plattsburgh, and Henry Davis, as administrator, etc., in the sum of two hundred and fifty ($250.00) dollars, to be paid to the said defendants-appellees, for the payment of which well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals, and dated the 17th day of February, 1902.

Whereas, the above-named complainant-appellant has prose-
223 cuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York;

Now, therefore, the condition of this obligation is such, that if the above named Anglo American Provision Company, complainant-appellant, shall prosecute its said appeal to effect and answer all damages and costs, if it fail to make its said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE CITY TRUST, SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, 160 *Broadway, N. Y.* [SEAL.]
JNO. A. SULLIVAN, *Vice-President.*
P. H. MOONEY, *Ass't Secretary.*

Sealed and delivered in presence of
——— ———.

STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 18th day of February A. D. 1902, before me personally appeared John A. Sullivan to me known, who being by me duly sworn, did depose and say: That he resided in the city of New York; that he is the vice-president of the City Trust, Safe Deposit and Surety Company of Philadelphia, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by section 3, chapter 720, of the New York Session Laws of 1893.

And the said John A. Sullivan further said, that he was acquainted with Patrick H. Mooney and knew him to be the assistant secretary of said corporation; that the signature of said Patrick H. Mooney subscribed to said instrument is in the genuine handwriting of said Patrick H. Mooney, and was thereto subscribed by like order of said board of directors and in the presence of him, the said John A. Sullivan vice-president.

[SEAL.]

WM. K. JARDINE,
Notary Public, Kings County, #58.

Certificate filed in New York county.

At a regular meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, for the purposes of organization, on the eleventh day of May, A. D., 1897, the following resolutions were adopted:

On motion of Dr. Baker, duly seconded, Mr. Stephen Farrelly, of the city of New York, was duly elected a vice-president of the company, resident in the city of New York, in the State of New York, with full power to execute in the name of the company, and to affix the corporate seal and duly acknowledge the same, any and all bonds or contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company in the State of New York.

On motion of Dr. Baker, duly seconded by Mr. Sailer, Mr. John A. Sullivan, of the city of New York, was duly elected a vice-president of the company, resident in the city of New York, in the State of New York, with full power in the absence of Mr. Stephen Farrelly, resident vice-president, to execute in the name of the company, and to affix the corporate seal and duly acknowledge the same, any and all bonds or contracts or suretyship that may be required and necessary to be executed in carrying on the business of the company, in the State of New York.

On motion of Dr. Baker, duly seconded by Mr. Sailer, Mr. John A. Sullivan was elected as assistant secretary of the company, in the

city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds or contracts of suretyship which have been signed by Mr. Stephen Farrelly, or Mr. John McAnerney, its resident vice-presidents, in the conduct of the business of the company in the State of New York.

At a regular monthly meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, on the ninth day of January, 1899, the following resolution was adopted:

On motion of Mr. Potts, duly seconded by Dr. Baker, Mr. Patrick H. Mooney was elected as assistant secretary of the company, in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds or contracts of suretyship which have been signed by Mr. Stephen Farrelly, or Mr. John McAnerney, or Mr. John A. Sullivan, it resident vice-presidents, in the conduct of the business of the company in the State of New York.

At a regular meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia, for the purposes of organization, on the fifteenth day of May, A. D., 1901, the following resolution was adopted:

On motion of General Wagner, duly seconded, the following gentlemen were unanimously re-elected as vice-presidents and assistant secretaries in the various places named: Resident vice-presidents at New York, Stephen Farrelly, John A. Sullivan; resident assistant secretaries at New York, John A. Sullivan, Patrick H. Mooney.

At a regular monthly meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia on the eighth day of July, A. D., 1901, the following resolutions were adopted:

On motion of Mr. Banes, duly seconded by Dr. Peirce, Mr. William K. Jardine was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. John A. Sullivan or Mr. Stephen Farrelly, its resident vice-presidents, in the conduct of the business of the company in the said State of New York.

On motion of Mr. Pfahler, duly seconded by Mr. McOwen, Mr. Edmund C. Lockwood, of the city of New York, was duly elected a vice-president of the company, resident in the said city of New York, in the State of New York, with full power to execute in the name of the company, and to affix the corporate seal thereto and duly acknowledge the same, any and all bonds and contracts of suretyship that may be required and necessary to be executed in carrying on the business of the company in the said State of New York.

At a regular monthly meeting of the board of directors of the City Trust, Safe Deposit and Surety Company of Philadelphia, held in the city of Philadelphia on the tenth day of February, A. D., 1902, the following resolutions were adopted:

On motion of Dr. Peirce, duly seconded by Mr. McOwen, Mr. John A. Sullivan was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. Edmund C. Lockwood, its resident vice-president, in the conduct of the business of the company in the said State of New York.

On motion of Mr. Sailer, duly seconded by General Wagner, Mr. William K. Jardine was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. Edmund C. Lockwood, its resident vice-president, in the conduct of the business of the company in the said State of New York.

On motion of Mr. Banes, duly seconded by Mr. Pfahler, Mr. Patrick H. Mooney was elected as assistant secretary of the company, resident in the city of New York, in the State of New York, and empowered to attest the corporate seal of the company to any and all bonds and contracts of suretyship which shall have been previously signed by Mr. Edmund C. Lockwood, its resident vice-president, in the conduct of the business of the company in the said State of New York.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

I, Patrick H. Mooney, assistant secretary of the City Trust, Safe Deposit and Surety Company of Philadelphia, have compared the foregoing resolutions with the originals thereof, as recorded in the minute book of the said company, and do certify that the same are a correct and true transcript thereof.

Given under my hand and the seal of the company, this 18th day of February, A. D. 1902.

P. H. MOONEY,
Assistant Secretary.

Statement of the City Trust, Safe Deposit and Surety Company of Philadelphia.

Incorporated 1886.

On the thirty-first day of December, 1901, the assets and liabilities of the company were:

Assets.		*Liabilities.*	
Cash on hand	$117,474 05	Capital stock	$500,000 00
Cash in banks	326,766 79	Surplus fund	150,000 00
Call loans upon collaterals	1,334,046 59	Re-insurance reserve	134,310 05
Time loans upon collaterals	94,460 00	Undivided profits	83,802 43
Loans upon bonds and mortgages	61,700 00	Deposits	2,295,312 08
Investment securities owned, stocks, bonds, &c.	437,707 00	Miscellaneous liabilities	12,416 00
Real estate, furniture, and fixtures	540,951 60		
Miscellaneous assets	262,734 53		
Total	$3,175,840 56	Total	$3,175,840 56

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Patrick H. Mooney, being duly sworn, says that he is assistant secretary of the City Trust, Safe Deposit and Surety Company of Philadelphia, and that the above is a correct statement of the financial condition of the company, on December 31st, 1901.

P. H. MOONEY.

Sworn to and subscribed before me, this 18th day of February A. D., 1902.

[SEAL.] WM. K. JARDINE,
Notary Public, Kings County, # 58.

Certificate filed in New York county.

225 (Endorsed:) U. S. circuit court, so. district of New York.—Anglo-American Provision Company, plaintiff-appellant, against The Davis Provision Company, *et al.* defendants & appellees.—Bond of the City Trust Safe Deposit and Surety Company of Philadelphia.—The signing and the execution of the within bond by the complainant is hereby waived. Dated New York, February 18th, 1902. Smith, Conway & Weed, attorneys for defendants, 26 Cortlandt St. N. Y. city.—Approved as to form, and the sufficiency of the surety. Smith, Conway & Weed, sol'rs for def'ts.—Approved, A. C. C., U. S. J. U. S. circuit court, southern district of New York, Filed Feb. 21, 1902, John A. Shields, clerk.

226 By the Honorable Alfred C. Coxe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants National Bank of Plattsburgh, Henry Davis, as administrator, etc., and American Surety Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington, in the District of Columbia on the 17th day of March, 1902, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Anglo American Provision Company is appellant, and you are appellees to show cause, if any there be, why the decree in said petition for appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named this 20th day of February, in the year of our Lord one thousand nine hundred and two, and of the Independence of these United States the one hundred and twenty-sixth.

ALFRED C. COXE,
Acting Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States circuit court of appeals, for the second circuit.—Anglo American Provision Co. appellant, *vs.* Davis
227 Provision Company, *et al.* appellees. Citation.—Copy received, this 24th day of February, 1902. Smith, Conway & Weed, solicitors for appellees.—U. S. circuit court, southern district of New York, Filed Mar. 4, 1902, John A. Shields, clerk.

228 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 227 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled Anglo-American Provision Company appellant against Davis Provision Company, Smith M. Weed, Frank E. Smith, Thomas F. Conway, George S. Weed, Merchants National Bank of Plattsburgh, Henry Davis as administrator etc., and American Surety Company appellees as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 15th day of March, in the

year of our Lord one thousand nine hundred and two and of the Independence of the said United States the one hundred and twenty-sixth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States circuit court of appeals for the second circuit. Anglo American Provision Company appellant *vs.* Davis Provision Co. *et al.* appellees. Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 18,574. S. New York C. C. U. S. Term No. 63. The Anglo American Provision Company, appellant, *vs.* Davis Provision Company, Smith M. Weed, Frank E. Smith, *et al.* Filed June 5th, 1902.

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 63.

Supreme Court U.S.
FILED
NOV 6 1903
JAMES H. McKENNEY,
Clerk.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

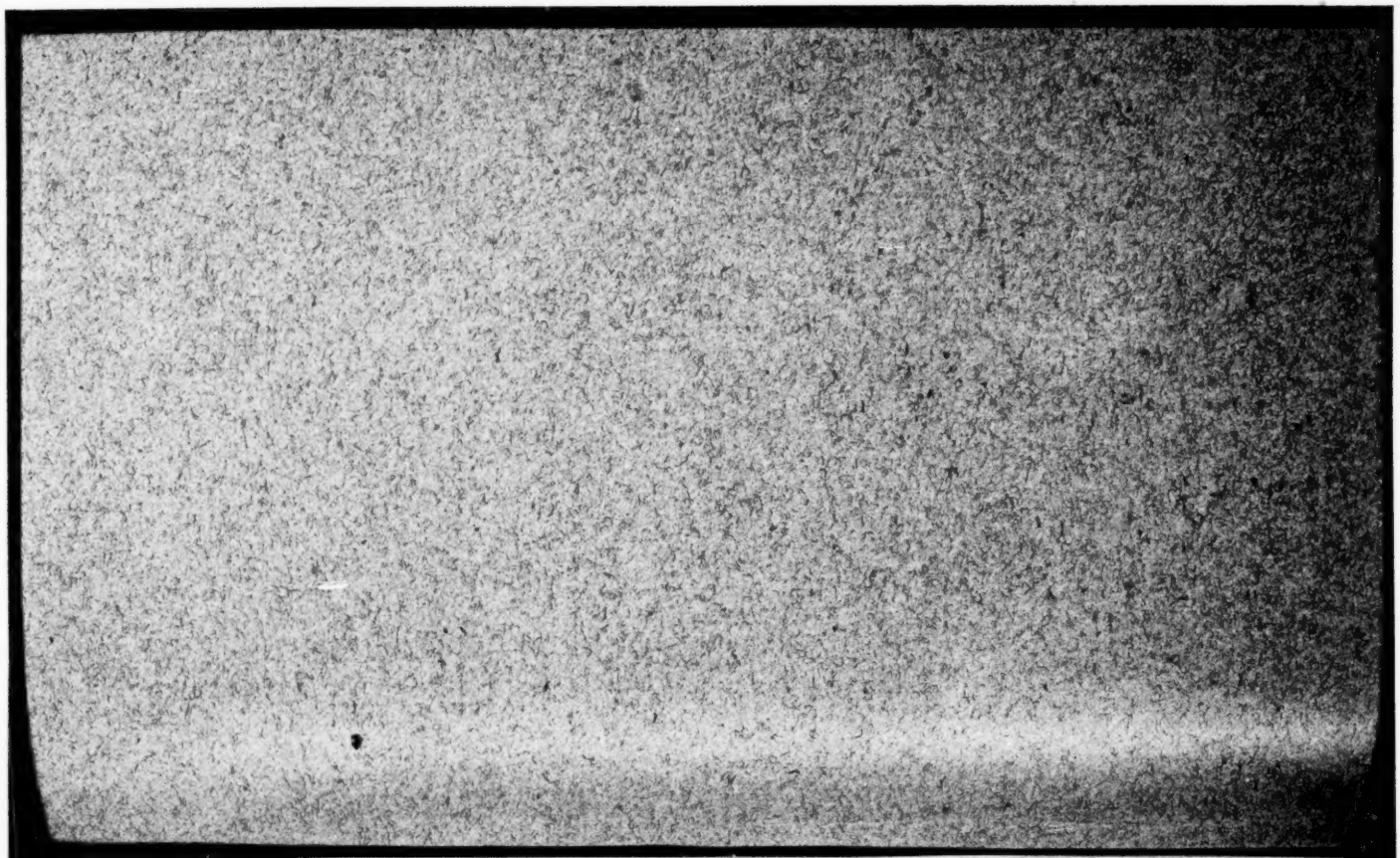
against

DAVIS PROVISION COMPANY, *et al.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF AND ARGUMENT ON THE PART OF THE APPELLANT.

HENRY WILSON BRIDGES,
Counsel for Complainant.



Supreme Court of the United States,

OCTOBER TERM, 1903.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,
against
DAVIS PROVISION COMPANY, *et al.*
No. 63.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Brief and argument on the part of the appellant.

STATEMENT OF CAUSE.

In November, 1893, the complainant, an Illinois corporation, instituted an action in the State of Illinois against the defendant, the Davis Provision Company, also an Illinois corporation. The defendant duly appeared in said action, and judgment was subsequently recovered for the sum of five thousand dollars ($5,000), no part of which has been paid.

In June, 1894, the defendant, the Davis Provision Company, brought an action in New York State against the complainant in this action and Fowler Brothers, Limited, a foreign corporation, organized under the laws of Great Britain, in which they recovered a judgment against the joint defendants for about nine thousand dollars ($9,000). That judgment was sustained against the defendants jointly, for the reason that the said corporations were found by the referee to be identical in fact and interest, as regards business relations with the Davis Provision Company. This latter judgment for Nine thousand dollars ($9,000) was taken on appeal to the Court of Appeals, and final judgment therein was entered on the 16th day of July, 1900, for a little over Nine thousand five hundred dollars ($9,500).

In November, 1899, complainant brought an action in New York State to establish against the Davis Provision Company the judgment obtained by it in the State of Illinois. The defendant demurred to this complaint. The demurrer was sustained both in first instance and on appeal to the Appellate Division of the Supreme Court of New York State (Transcript pp. 1-5). The complaint, the demurrer and the opinion of the Appellate Division are respectively Exhibits A, B and C of the record (Trans. pp. 5-8). Complainant brought this action praying that the judgment of the State of Illinois, which, it alleges, arose out of the same transactions as the judgment obtained by the Davis Provision Company, should be set off against the judgment of New York State, on the ground that the decision of the Appellate Division of the Supreme Court of that State deprives complainant of a right secured to it under the constitution and laws of the United States.

The defendants duly appeared in said action, and

filed their demurrer (Trans. pp. 9-10), which said demurrer was overruled by the Court (Trans. pp. 11-12), and defendants given the privilege to answer over. The defendants thereupon duly answered (Trans. pp. 13-24). The answer of the defendants, Smith M. Weed, Merchants' Bank and Henry Davis, having been once amended pending the litigation (Trans. p. 13).

This amended answer contains the whole defence, the other answers being merely repetitions or amplifications, except in one respect, which will be noted later. This answer alleges as follows:

FIRST. It admits all the matters of record alleged in the complaint.

SECOND. They deny that the New York judgment was sustained against the Anglo-American Provision Company and Fowler Bros., Ltd., jointly on the ground that said corporations were identical in fact and interest (Trans. p. 13).

THIRD. They deny that the Illinois and New York judgments arose out of the same transactions (Trans. p. 14).

FOURTH. They claim that Smith, Conway & Weed have a first lien on the New York judgment for professional services, and that Smith M. Weed is entitled to the remainder by virtue of an assignment dated May 25th, 1895, which assignment was made in pursuance of an agreement made about October 23rd, 1893, that payment of certain loans should be secured by these claims against the Anglo Company (Trans. pp. 15-16); and further, that this assignment was made for good consideration and without any knowledge on the part of said Smith M. Weed of complainant's rights in the premises (Trans. p. 15).

FIFTH. That the complainant has been guilty of laches in not diligently prosecuting the Illinois judgment, and that when sued in New York, complainant did not set up by way of counterclaim the subject matter of said judgment (Trans. p. 15).

These issues were heard on the record, before Mr. Justice Coxe, who found for the defendants on the merits (Trans. pp. 129-132).

From this decision complainant appealed directly to this Court (Trans. p. 134) on the ground that complainant's suit was based on a clause of the constitution.

Notwithstanding the denials in the answers that the New York and Illinois judgments arose out of the same transactions and also that the New York judgment was sustained against complainant and Fowler Brothers, Ltd., jointly on the grounds of identity, *the allegations of complainant's bill stand in both respects uncontradicted on the record* (Trans. pp. 43-44, 52, 7th and 8th clauses of stipulation, pp. 40-41).

As stated by the Court, *the "only defences relied on"* were (1) the assignment to Weed and (2) laches of the complainant. We will therefore in the argument confine ourselves to these two points. Trans., p. 129) and the question of jurisdiction.

Specification of Errors.

FIRST. The Court below erred in finding that the cause of action in the Illinois suit might have been counterclaimed in the New York suit and *vice versa*.

SECOND. The Court below erred in finding "that in order to pay the judgment it was necessary to borrow $13,500 from the Plattsburgh National Bank. The bank agreed to loan the money pro-

vided the defendant, Smith M. Weed, would endorse the paper, the Davis Company to give him as security the claims against the Anglo-American Company a certain stock, that turned out to be worthless."

THIRD. The Court below erred in not finding that there was no competent evidence whatever of any transaction between the defendant, Smith M. Weed and the Merchants' National Bank of Plattsburgh, affecting the relations between the Anglo-American Provision Company and the Davis Provision Company as regards the subject matter of this action.

FOURTH. The Court erred in taking into consideration the testimony relating to the alleged transactions between the defendants Smith M. Weed, Davis Provision Company and The Merchants' National Bank of Plattsburgh alleged to have taken place during the year 1893 and in not holding that all such evidence was incompetent, irrelevant and immaterial and was not the best evidence, but was all secondary evidence.

The specific testimony is contained in the record (Trans., pp. 48-49, 52-53) and is partly as follows:

Questions addressed to the witness Henry Davis, president of the Davis Company.

Q. In 1893 did you make a loan in behalf of your company through the Merchants' National Bank of Plattsburgh of $13,500?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. What paper or obligation was given for the loan?

Same objections.

A. Three notes.

Q. Who were the parties to these notes?

Same objection, and that it is not the best evidence.

A. They were signed by myself and endorsed by Mr. Weed one note, I think, and one note was signed by Mr. Weed and endorsed by me and were in favor of the Davis Provision Company (Trans., pp. 48-49).

Q. Will you look at the copies of the notes handed you and say if they are copies of the notes which you gave at the time you obtained the loan of $13,500?

Objected to as incompetent, irrelevant and immaterial, and not the best evidence.

A. Yes, sir. (Trans., pp. 52-53).

FIFTH. The Court below erred in holding that there was no "direct proof that Weed knew at that time of the claims which were afterwards included in the Illinois suit."

SIXTH. The Court below erred in not finding that it was a necessary presumption that Weed at that time knew all about the claims which were afterwards included in the Illinois suit.

SEVENTH. The Court below erred in finding that "on the 27th day of May, 1895, during the pendency of the action which resulted in the $9,678 judgment, the Davis Company transferred by written assignment the claims in controversy to said Weed."

EIGHTH. The Court below erred in not finding that there never was or never has been any valid assignment of any claims involved in this proceeding by the Davis Provision Company to Smith M. Weed.

NINTH. The Court below erred in finding that the "evidence that the company exercised dominion over the claims after the assignment to Weed" was "insufficient to overthrow the positive proof that the assignment and the agreement therefor were in fact made."

TENTH. The Court below erred in not finding that the various acts of dominion exercised by the said Davis Provision Company after October, 1893, and especially their setting up of the subject matter of the New York judgment in counterclaim to the action in Illinois out of which arose the judgment in suit was sufficient to invalidate any attempted assignment to the defendant Weed.

ELEVENTH. The Court below erred in not finding that the written assignment made on the 27th day of May, 1895, was made during the insolvency of the said Davis Provision Company to convey its assets to its director and vice-president, and was presumptively fraudulent and void.

TWELFTH. The Court below erred in holding that "the action of Weed in procuring $13,500 on his own personal credit and paying it into the company's treasury was an act from which he could derive no personal benefit and which was likely to result as in fact it has resulted in pecuniary loss to him." That it was done in the interest of the creditors and in good faith, to enable the company to pay this debt; that it was done to prevent insolvency.

THIRTEENTH. The Court below erred in holding "that the assignment of May 27th, 1895, was the fulfillment of the agreement of October 23rd, 1893, and that it was a *bona fide* transaction."

FOURTEENTH. The Court below erred in holding "that the judgment recovered in the Supreme

Court of New York, December 13th, 1895, and affirmed by the Court of Appeals, July 16th, 1900, which was nominally in favor of the Davis Company was actually in favor of Smith M. Weed against the Anglo-American Provision Company."

FIFTEENTH. The Court below erred in holding that it was the established rule "in this State that the *bona fide* assignee of a judgment can collect it of a judgment debtor notwithstanding the fact that afterwards the latter recovers a judgment against the assignor. The second judgment cannot be set off against the first."

SIXTEENTH. The Court below erred in not finding that the *bona fide* assignee of the judgment cannot collect it of the judgment debtor where the judgment debtor has recovered a judgment against the assignor and the assignor was insolvent at the time of the assignment where the said judgment did not arise out of a judgment sounding in tort.

SEVENTEENTH. The Court below erred in holding, that though at the time "Weed acquired an equitable interest in the chose in action against the Anglo-American Provision Company, his interest was liable to be defeated by counterclaim properly asserted against the Davis Company," still it was not defeated because no such claims were asserted and complainant is guilty of laches because it might have pleaded the same in set off in the New York action.

EIGHTEENTH. The Court below erred in dismissing the bill of complaint herein.

NINETEENTH. The Court below erred in not adjudging that the amount of the judgment obtained in the State of Illinois by said complainant against

the said defendant, The Davis Company, be set off against and deducted from the amount of the judgment obtained in the State of New York by the said Davis Provision Company against the complainant herein and Fowler Brothers (Limited); that the defendant, The Davis Provision Company and its assigns, be forever enjoined from enforcing the judgment obtained in New York State by the said Davis Provision Company except for the excess of the amount of said New York judgment over and above the amount of said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action; also that the defendant, The American Surety Company, be forever enjoined from paying over to the other defendants herein any sum or sums except the excess of said New York State judgment over said Illinois judgment, less a reasonable amount to cover the costs of complainant in this its present action."

Argument.

FIRST. The Court had jurisdiction of the cause of action.

SECOND. The Court erred in paying any attention to the transaction relating to notes alleged to have been made in December, 1892, and reduced to judgment in October, 1893. The fact was immaterial, and the evidence incompetent [Trans., pp. 129-130, 134-135, assignments 2nd, 3rd, 4th, 12th and 13th].

THIRD. The Court erred in finding that the assignment to Weed dated May 27th, 1895, was a valid assignment, good as against complainant for the following reasons:

a. Weed had full knowledge of the equities in complainant's favor [assignments 5th and 6th].

b. The Davis Company, with Weed's consent, exercised full dominion over the subject matter of the purported assignment after the date thereof [assignments 9th and 10th].

c. The assignment was by an insolvent corporation to its director and vice-president to secure an antecedent debt [assignments 11th, 12th and 16th].

FOURTH. The Court erred in finding we were guilty of laches in not pleading the subject matter of the Illinois judgment in set-off when we were sued in New York [assignment 17th].

I.

The Court had jurisdiction of the cause of action.

That the complainant had the right to bring this action in the U. S. Circuit Court under the Civil Rights statute is fully borne out by the decision below (Trans., pp. 11-12), and the case of the Northwestern Fertilizing Company vs. Hyde Park (3 Biss., 480).

II.

The Court erred in paying any attention to the transaction relating to notes alleged to have been made in December, 1892, and reduced to judgment in October, 1893. The fact was immaterial and the evidence incompetent.

The Court in its decision is very plainly of the opinion that this evidence was of great weight. Granting for the sake of argument that it is all

true, it simply means that the vice-president (Trans., p. 115) of the Davis Company lent his credit to the company for the purpose of paying off lawful judgments obtained against it by the Anglo-American Provision Company. The transaction was closed and the company became indebted to Weed. What the nature or origin of this indebtedness was can have no bearing on this case. Yet the Court goes into a long discussion of this very matter, commenting it as "a laudable and necessary act" (Trans., pp. 130-131).

There is no competent evidence of the facts stated.

All these transactions relate to written documents. Copies of the notes were allowed in evidence after complainant had objected to them as not the best evidence, and no attempt was made to show that the originals had been lost or destroyed (Trans., pp. 48-49, 52-53, and 4th specification). Although the said notes were claimed to be the consideration for the pretended assignment.

III.

The Court erred in finding that the assignment to Weed dated May 27th, 1895, was a valid assignment, good as against complainant.

Let us first consider the facts and circumstances relating to this document.

This assignment, which is Defendant's Ex. "A" of March 15th, 1901 (Trans., pp. 35-38), is dated May 27th, 1895 (Trans., p. 36), the same date on which receivers of the company were appointed both in Illinois and New York (Trans., pp. 69,

126). In the original, the document was typewritten and *the date was written in* (Trans., p. 66).

It is signed,

DAVIS PROVISION COMPANY,
By Henry Davis, (Seal),
Prest. (Trans., p. 36).

On the 24th day of the month, three days before the assignment, both Weed and Davis swore the company was insolvent (Trans., pp. 123, 125).

This instrument was never acknowledged until after it was offered in evidence on this trial, nearly six years after the date (Trans., pp. 66, 36-37), and no record of authorization on the part of the Company was ever produced, *although expressly called for* (Trans., p. 66).

In fact, defendants do not really seem to have known very much about this assignment themselves until this litigation arose, for after all the testimony was taken, *they moved to amend the answer of defendant Weed, which was done on the* 22nd *day of March*, 1901 (*Trans., p.* 13), *by alleging that the assignment was made pursuant to an agreement made on or about October* 23rd, 1893, *to indemnify said Weed for certain indorsements* (Trans., p. 16). Previous to that time the allegations of this answer were in the same form as the other answers as to this assignment.

This instrument purports to convey the claim out of which the judgment arose, which is involved in this action and against which we are seeking set-off, together with five other actions to said Smith M. Weed (Trans., pp. 35, 36).

They do not allege that transfer was actually made by written document until May 27th, 1895. Shortly before that time, a meeting, they claim, was held at one of two places, when they actually authorized the assignment of these claims (Trans.,

pp. 62-63). At this time, the assignee and assignor only being present, a resolution was passed directing the transfer of the assets of this company to its director and vice-president, Smith M. Weed (Trans., p. 63).

This meeting was apparently of too little importance to reduce the minutes to writing, although the by-laws of the corporation expressly command that this be done (Trans., pp. 112-113, Sects. 14-16).

This, too, notwithstanding this whole arrangement was made, they allege, in October, 1893, and they produce *minutes of a meeting of the corporation held on December* 2nd, 1893 (Trans., p. 116), which meeting was attended by both Weed and Davis.

Why all this silence about the assignment of eighty-five thousand dollars' worth of claims in suit?

(A)

Weed had full knowledge of the equities in complainant's favor (assignments 5th and 6th).

Although defendant Weed denies any knowledge of our rights in his answer (Trans. p. 15), he is forced on cross-examination to admit that in December, 1893, he, the vice-president of the Davis Company, at a meeting of the directors of that company, moved the following resolution:

> "Resolved, That all matters relating to any and all claims, disputes, settlements and litigation between this company and the Anglo-American Provision Company, Fowler Brothers, and Anderson Fowler, and everything connected therewith, be and the same

> hereby are referred to the president *and vice-president* with full power and authority (Trans., pp. 63-64)."

It has been held that where a cause of action is assigned during the pendency of the action, but before judgment, and judgment is afterwards obtained thereon, a judgment in favor of the judgment debtor and against the judgment creditor may be set-off against it, when the assignment of the demand was taken by the assignee with notice of the equity of set-off.

Lammers v. Goodeman, 69 Ind., 76.

This is exactly our case, except in our case we allege insolvency and there they do not.

We admit that there are cases holding that the assignment of a demand previous to the entry of judgment upon it, transferring a legal or even an equitable title to such demand, gives the assignee a superior equity to that of a party claiming a right to set off a judgment previously recovered against the assignor, and prevents the right of set-off from accruing.

Am. and Eng. Encyc., p. 459.
Mackey v. Mackey, 43 Barb., 58.

We respectfully submit that all such cases can be easily distinguished from the case at bar. They are all cases arising in tort where no right of set-off exists previous to entry of judgment, and the principle established is, that if these claims are assigned to protect an attorney's lien, or in consideration of charges, after verdict and before entry of judgment, that the mere subsequent entry of judgment would not allow a defendant to set-off against the same a judgment against the plaintiff which he had purchased, although entry of judgment without any assignment, transferring the

claim in tort into one on contract, would have given a right to set-off against plaintiff in the tort action where none existed before.

There is much confusion in the statement of the doctrine in the New York cases, but this seems to be the rationale of the decisions.

We submit that wherever set-off has been refused in any case on account of assignment it may be distinguished from our case on one or both of the following grounds:

FIRST. The assignment will be found to be of a cause of action arising in tort.

SECOND. There will be no allegation or proof of insolvency or knowledge of defendant's rights on the part of the assignee.

The New York cases also seem to make a distinction between cases where the remedy is sought on a summary application and where it is sought by Bill in Chancery.

Pignolet v. Geer, 19 Abb. Pr., 267.

This case quotes

Barber v. Spencer, 11 Paige, 517,

as follows:

> "The right of set-off upon a summary application to a court of law or equity exists only in cases where the debts on both sides are liquidated by judgment or decree, before the assignment of either to a third party." It then goes on to say: "It is presumed that the decision of the motion, both in this Court and the Court of Appeals, was upon the authority of the cases cited and others sustaining the same doctrine. *But a Court of Equity, in an action brought for the purpose, may allow set-off where the equitable right to such set-off*

existed before the assignment to a third person, notwithstanding neither of the demands had at that time been liquidated by judgment or decree."

(B)

The Davis Company with Weed's consent exercised full dominion over the subject matter of the purported assignment after the date thereof.

The Davis Company never apparently lost control of these claims for a single instant up to the assignment of May 27th, 1895. It brings action on them in its own name subsequent to October, 1893. It assigns one of the claims to Mark H. Davis, who, in the very assignment of May 27th, 1895, states that, "the avails or recovery were to belong to said Davis Provision Company" (Trans., p. 38).

Moreover, the assignee of said company, appointed in the State of Illinois, scheduled each and every one of these claims as assets of the Davis Company (Trans., p. 127), and they were reported to them as such assets by the New York Ancillary Receivers (Trans., p. 126). Nor is there any mention of any assignment as security or otherwise to Smith M. Weed, *although this occurred three months subsequent to* May 27th, 1895 (Trans., p. 125). Unfortunately, the receivers in New York never filed any schedules at all (Trans., p. 74).

On these facts we submit there never has been any valid assignment whatever of these claims to Smith M. Weed. *It is a foundation principle of the law of assignment that in order to constitute a valid assignment the assignor must lose control and direction over the subject-matter of the assignment.*

Christmas v. Russell, 14 Wall, at p. 84.

THE DAVIS PROVISION COMPANY HAS ALREADY USED THE SUBJECT MATTER OF ITS JUDGMENT AS SET-OFF IN THE ACTION WHICH RESULTED IN OUR JUDGMENT.

It is a good maxim in law as well as morals that "it is a poor rule which does not work both ways," and *it is admitted that in the action out of which our Illinois judgment arose the defendant, the Davis Company, counterclaimed some of the items which are now included in the New York judgment* (*Trans., p. 40*).

Naturally inasmuch as they already had judgment on these items secured by American Surety Company bond they were compelled to withdraw their plea in set-off in the Illinois action which they did by stipulation on December 27th, 1898 (Trans. p. 40).

If the Davis Provision Company could use these claim for purposes of set-off after agreeing to assign them to defendant Weed (Trans., p. 16), what rule of law or equity can prevent our having set-off of a judgment arising out of the very subject matter against which they have pleaded such claims in set-off.

Also Smith M. Weed, the vice-president of the company, having consented to the use of these claims for such a purpose, is estopped from preventing our assertion of the right of set-off of the judgment.

(C)

The assignment was by an insolvent corporation to its Director and Vice-President to secure an antecedent debt.

Where there has been an assignment during the pendency of an action, and previous to the entry of judgment, the right of set-off is never denied, *where the complainant assignor was insolvent at the time of the assignment.*

Gay vs. Gay, 10 Paige, 369.

It was also held in this case that where an equitable right of set-off exists while the parties have mutual demands against each other, and where the demand due the party claiming such set-off is such that it is impossible for him to obtain satisfaction of such debt by ordinary suit to recover the same, Chancery on bill filed will compel set-off of one debt against the other, *and insolvency of the party against whom the set-off is claimed is sufficient ground to authorize the Court of Chancery to grant relief in such cases.* The Davis Provision Company was confessedly insolvent on the 27th day of May, 1895 (Trans. pp. 69, 122, 124). Under these circumstances it is unlawful both under the law of New York State and that of Illinois for an insolvent corporation to convey assets to one of its directors.

Throop vs. Hatch Litho. Co., 125 N. Y., 530.

Rosebloom vs. Whittaker, 132 Ill., 81.

The New York statute, which is simply declarative of the law as it exists both in New York and in Illinois, is as follows:

"Whenever any incorporated company shall have refused the payment of any of its notes, or

other evidence of debt, in specie or lawful money of the United States, it shall not be lawful for such company or any of its officers to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it shall not be lawful to make any transfer or assignment in contemplation of insolvency, to any person or persons whatever; and every such transfer or assignment to such officer, stockholder or other person, or in trust for them or their benefit, shall be void."

Rev. Stat., part. 1, sec. 4, title 4, chap. 18.

The reason for the rule is perfectly apparent. The directors and officers of an insolvent corporation are trustees of its funds, and any appropriation of those funds to the preferential payment of their own debts is presumed to be absolutely fraudulent and void. The Court below, however, has held that because the written assignment of May 27th, 1895, was made in accordance with an agreement entered into in October, 1893, therefore the whole transaction was valid and most commendable (Trans. pp. 130-131). If officers and directors of a quiescent corporation are thus to be allowed to violate the rule of law, it might as well be abrogated; for it will always be found that where there is a transfer of the assets of an insolvent corporation in liquidation of a past indebtedness due to such director or officer, there was just such an agreement for the transfer of those very assets at the time the debt was contracted, as exists in this case.

THE CIRCUMSTANCES SURROUNDING THIS ASSIGNMENT ARE MOST SUSPICIOUS.

Even the Court says: "The business was so informally and carelessly done that the records of the

Davis Company fail to disclose the transaction" (Trans., p. 130). *The first answer failed to allege anything about the agreement of October, 1893.* The company continually used the claims as their own assets even after the making of the written assignment (*supra*). Notwithstanding this, the Court has said: "In order to reach a contrary conclusion the Court must arbitrarily reject the uncontradicted testimony of a number of intelligent and unimpeached witnesses."

Who are these witnesses?

Besides Weed there are two witnesses to this transaction on behalf of defendant in error. They are Henry Davis and John M. Wever. Davis was president of the company, and one of the parties to the notes alleged to have been made in 1893 (Trans., pp. 48, 93). John M. Wever was cashier of the bank that made the loan. This last so-called "unimpeached witness" swears in March, 1901, that Weed is "*morally*" the trustee for the bank to the extent of any sum recovered on the claims involved, because in October 1893, he insisted that Weed should have these claims as security (Trans., p. 54). His reliability is shown by the record in the action instituted by Smith M. Weed in the U. S. Circuit Court for the northern district of Illinois, in which action Weed asked for the appointment of a receiver for the Davis Provision Company (Trans., pp. 120-128; Complainant's Ex. 1). In this action the receiver, the Chicago Title & Trust Company, three months after the assignment, namely, on September 7th, 1895, filed a report to which is attached an inventory of the assets of the Davis Company. *This inventory was furnished by John M. Wever, and includes every one of the claims he now swears were assigned to Davis in 1893* (Trans., pp. 126-127).

IV.

The Court erred in finding that we were guilty of laches in not pleading the subject matter of the Illinois judgment in set-off when we were sued in New York.

If appellant had alleged the subject matter of this Illinois judgment in set-off in the New York action it would of course have been an equity superior to any assignment. This defendants would seem to admit, for they allege in their answers that we did not so counterclaim in the New York suit (Trans., p. 15). The reason for our not doing so is perfectly obvious. *Complainant had eight months previous to the beginning of the New York action started to establish its rights in the State of Illinois* (Trans., pp. 25, 76). Having by superior diligence endeavored to establish these claims between the same parties in the jurisdiction of their domicile, we submit that no court will compel us to try our cause of action *de novo* in a foreign jurisdiction.

> "It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction it has a right to decide every question which occurs in the case; and whether its decision be correct or otherwise its judgment till reversed *is regarded as binding in every other court*, and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court."
>
> Central Nat. Bank vs. Stevens, 169 U. S., at 459.

We admit that, had we seen fit so to do, we could have set up the subject matter of our Illinois pro-

ceeding by way of counterclaim in the New York suit, but we insist that it is not necessary, and that our Illinois proceeding protects us to exactly the same extent as though we had counterclaimed in New York State. Unless this is so, the Court will not be giving "full faith and credit" to the Illinois proceeding. We respectfully submit that the courts have never before refused to grant a stay of proceedings where there have been two actions pending between the same parties, on the same subject matter, in different jurisdictions, and to grant abatement whenever judgments have been obtained in either of the actions.

Hurst v. Everett, 21 Fed. Rep., 218.
Walsh v. Durkin, 12 John., 99.

In the latter case the defendant pleaded in abatement another action brought by plaintiffs against defendants upon the same promises and undertakings in another jurisdiction; the plea was demurred to and demurrer sustained, on the express ground (p. 100) that it is the "definitive judgment on the merits only which is * * * conclusive," and further, on the ground (p. 101) "that the judgment at least, if not a recovery in one suit, might be pleaded *puis darrein continuance* to the other suit.

In other words, the Court expressly says it will not allow any such outrageous injustice as is threatened here, and one judgment may be pleaded in bar to another; nor is it necessary that the matter be pleaded by way of counterclaim in the second suit.

Complainant instituted its action in Illinois in November, 1893 (Trans., p. 25).

It is admitted on the record that we were not guilty of laches in not bringing this case to trial in Cook County for a period of two years (Trans., p. 42). The defendant company was insolvent at

the expiration of this time, and had gone into the hands of a receiver (Trans., pp. 69, 122, 124). What possible object, therefore, could we have had in pressing this litigation? The Illinois judgment was valueless to us except for purposes of set-off, and we were at that time engaged in appealing to the higher courts in New York State from what we considered unjust judgments against us.

Final judgment was not entered in the New York action until the 16th day of July, 1900 (Trans., p. 39), and we had on the November preceding taken the first step necessary to establish our judgment in this State (Trans., p. 14).

From June 12th, 1894, the time when they instituted action in this State (Trans., p. 76), up to July 16th, 1900, our hands were tied, for under the New York decisions we could not obtain any set-off pending appeal.

> De Camp v. Thompson, 159 New York., 444.

Certainly defendants are in no position to take advantage of this state of affairs for two reasons.

FIRST. They can show absolutely no injury arising from delay.

It is a fundamental principle of the law of laches that "mere delay alone, short of the period fixed as a bar by the Statute of Limitations, will not preclude the assertion of an equitable right.

It is only when, by delay and neglect to assert a right, the adverse party is lulled into doing that which he would not have done, or into omitting to do that which he would have done in reference to the property, had the right been promptly asserted, that the defence of laches can be considered."

> Gibbons v. Hoag, 95 Ill., at 69.
> Scherer v. Ingerman, 110 Ind., 428.

SECOND. If there is any laches they are equally guilty with ourselves, for the case could have been moved on by them as well as by us (Trans., p. 42).

In closing, we submit that if set-off of one judgment against another is ever to be allowed, it should be granted in this case.

The judgments rose out of mutual, open, running accounts (Trans., pp. 44, 52). There was full knowledge on the part of all parties (Trans., p. 64).

The principal defendant, the Davis Provision Company, who is now opposing the set-off, has itself pleaded the subject-matter of one judgment in set-off to the other (Trans., p. 40).

Complainant has shown superior diligence to defendant in enforcing its rights (Trans., pp. 25, 76).

Respectfully submitted,

HENRY WILSON BRIDGES,
Counsel for Complainant.

[2011]

7149

FILE COPY.

Supreme Court of the United States,

OCTOBER TERM, 1903.

Office Supreme Court U.S.
FILED
NOV 7 1903
JAMES H. McKENNEY,
Clerk.

No. 63.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

against

THE DAVIS PROVISION COMPANY AND OTHERS,
Appellees.

BRIEF FOR APPELLEES.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Appellees.

1917 Law) MARTIN B. BROWN CO., Printers, 49 to 57 Park Place, New York.

Supreme Court of the United States.

ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

against

THE DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, THOMAS F. CONWAY, GEORGE S. WEED, THE MERCHANTS' NATIONAL BANK OF PLATTSBURGH, and HENRY DAVIS, as Administrator, etc.,
Appellees.

No. 63.
October Term, 1903.

BRIEF FOR APPELLEES.

Appeal by complainant below from a decree of the Circuit Court for the Southern District of New York dismissing bill on the merits.

The suit is brought to procure a set-off of judgments. The complainant seeks to use a judgment rendered in its favor against the Davis Provision Company in Illinois, to pay in part a judgment against it in the courts of New York, in form in favor of the Davis Provision Company, but which is in fact the property of the other defendants.

The theory of the bill is that the two judgments arose out of the same transaction and that the transfer by the Davis Company to the other defendants was without consideration and in fraud of the rights of the complainant.

Defendants originally demurred to the bill for want of jurisdiction, the complainant and the defendant, the Davis Provision Company being both Illinois corporations and there being nothing in the bill to make a case arising under the Constitution or laws of the United States.

The demurrer was overruled and the jurisdiction sustained upon the theory that the law of the State of New York which closes the courts of that State to an action brought by one foreign corporation against another foreign corporation upon a cause of action arising outside the State, in effect deprives the complainant of a right enjoyed by white citizens, and is therefore a violation of the laws of the United States designed to secure equal rights. (Revised Statutes, §1977–1979). The present suit was therefore treated as one brought to redress this deprivation and within the jurisdiction conferred on the Court by the sixteenth subdivision of section 629 of the Revised Statutes. (Opinion of WHEELER, *J.*, overruling demurrer, p. 11).

After the decision of the demurrer defendants answered denying the facts essential to the equity of the bill, namely: that the judgments sought to be set off had their foundation in the same transaction, and that the Davis Company was really the owner of the judgment nominally in its favor.

Complainant replied, and proofs were taken.

The facts established are as follows:

(1). The Anglo-American Provision Company and the Davis Provision Company are both Illinois corporations. The latter company was organized in 1886. It was operated in connection with the Anglo-American Provision Company and Fowler Brothers, Limited, and

its main purpose was to handle and dispose of their products (Record, p. 92).

(2). A large business was done between the two companies, continuing to 1893. After a time the Davis Company, through Henry Davis, its president, assertep that the goods being shipped to it were not in all cases of such quality as it was entitled to receive under existing contracts, and it began making reclamations (p. 95).

(3). These claims were not at first either allowed or rejected by the Anglo-American Company, but held in abeyance, and settlements of account were made between the parties without reference to them (p. 95, 26th finding).

(4). The Davis Company, from its organization in 1886 to 1893, was dominated and controlled by the Anglo-American, a majority of its directors being officers or employees of the latter company (p. 93, 12th finding; p. 100, 42d finding).

(5). In June, 1891, at a meeting of the directors of the Davis Company, a resolution was adopted abandoning a large part of the claims of that company on the Anglo-American, and settling the balance for a trifling sum. Mr. Davis, the president of the company, and the only director who was not also a director of the Anglo-American, dissented and protested (p. 117).

(6). In December, 1892, the Davis Company closed its account with the Anglo-American, and gave it three notes for a balance due it, amounting to $23,546.67, the Anglo-American refusing to allow the back claims (p. 98, 33d finding). After this there was no further dealing between the companies, except for cash (p. 102, 51st finding).

(7). At the annual meeting of stockholders of the Davis Company, held in June, 1893, Anderson Fowler was discarded as a director and Smith M. Weed elected, the Board thereafter consisting of Henry Davis, Smith M. Weed and Robert Stobo (p. 114). This change in its directorate, for the first time, made the Davis Com-

pany independent of the Anglo-American (p. 101, 46th finding).

(8). The notes given by the Davis Company to the Anglo-American in December, 1892, were transferred by the latter company to Fowler Brothers, Limited, and when they came due in 1893 the latter company brought suit thereon in New York. The Davis Company attempted to interpose an answer setting up its claims against the Anglo-American as a counter claim, but through the inadvertence of its attorneys certain provisions of the Code were not complied with and judgment was entered against it as by default in October, 1893, for about $15,000. The Davis Company thereupon paid the judgment so entered against it upon an agreement with Anglo-American and Fowler Brothers, Limited, that such payment should be without prejudice to its claims (p. 101, 48th finding).

(9). The Davis Company was compelled to borrow money to enable it to pay the judgment so obtained against it by Fowler Brothers, Limited. It applied to the Merchants' National Bank of Plattsburgh, which agreed to loan it $13,500, provided the defendant Weed "would go on the paper" and security be given him (p. 53, 54). This Weed agreed to do upon an agreement with Henry Davis, as President of the Davis Company, that the claims of the Davis Company against the Anglo-American and also certain stock of a milling company should be assigned to him as security (Davis, p. 49; Wever, p. 53, 54; Weed, p. 61). Three notes were made, upon one of which Weed was maker and on the others indorser, amounting to $13,500, the proceeds thereof credited to the Davis Company in the bank and a draft drawn against it which was used to pay the judgment recovered by Fowler Brothers (p. 50). Of this loan $10,000 is still unpaid and renewal notes to which defendant Weed is a party are now held by the bank (p. 55–63). The milling company stock, which was part of the security given on

the loan, has proved to be worthless (p. 51–55). Formal written transfer of the claims in question to Weed was not made till May, 1895.

(10). In November, 1893, the Anglo-American brought a second action against the Davis Company, this time in Illinois, seeking to recover for certain goods sold and delivered, etc. (p. 28). The Davis Company defended the action, pleading among other things as a set-off, certain of its claims against Anglo-American (p. 31). This plea of set-off was withdrawn in December, 1898 (p. 33), and in January, 1899, the Anglo-American obtained judgment for $5,049.98, which is the judgment sought to be used as a set-off in this suit (p. 3[illegible], 34).

(11). In December, 1893, the Davis Provision Company, through its new Board of Directors, repudiated as a fraud on the company the action of its former Board in 1891, abandoning and settling the claims of the company against the Anglo-American and authorized legal proceedings to be taken to enforce those claims (p. 117, 118).

(12). In June, 1894, the Davis Company brought an action in the courts of New York, against Anglo-American and Fowler Brothers, Limited, to recover certain of the claims amounting to $25,229.77. Both defendants appeared and answered. They denied generally the claims asserted, and alleged various defenses, but did *not* set up or assert any set-off or counter claim whatever, although at this time the action brought by the Anglo-American was pending in Illinois (p. 41; 9th par. of Stipulation). The claims which were asserted in this action ranged in point of time from 1888 to 1892 (Bill of Particulars, p. 85–90).

(13). In May, 1895, and while the action was pending, the Davis Company made a formal written assignment of all its claims against the Anglo-American, including those sued on in the pending action above mentioned to defendant Weed. This assignment declares on its face

that it is to secure him for the liabilities of the Davis Company to him (p. 35–38; 2d par. of Stipulation). It was executed and delivered on May 27, 1895, the day it bears date (p. 69). On the same day, and after the delivery of the paper, receivers were appointed for the Davis Company in both Illinois and New York (p. 69, 121–128).

(14). The action then pending in New York was continued in the name of the original plaintiff (as authorized by the law of that State) and such proceedings were had that on December 13, 1895, judgment was rendered nominally in favor of the Davis Company, and against Anglo-American Company and Fowler Brothers, Limited, jointly, for $7,892.44 damages, and against Anglo-American alone for $615.38 damages, and against both defendants for $1,349.80 costs (p. 104, 105). The defendants in that judgment appealed. The Appellate Division of the New York Supreme Court struck out $1,653.72, and as modified affirmed it October 2, 1897. Defendants appealed to the Court of Appeals, which affirmed the judgment in July, 1900 (p. 39). This is the judgment against which complainant seeks to set off its Illinois judgment.

(15). In November, 1899, the Anglo-American brought an action at law in the New York courts against the Davis Company alone on the Illinois judgment, seeking simply to recover as damages the amount thereof, to wit, $5,049.98. The Davis Company demurred upon the ground that the cause of action—the Illinois judgment—did not arise within the State, and therefore, both parties being foreign corporations, the court had no jurisdiction. This demurrer has been so far sustained (Bill, p. 2, 3. Answer, p. 14).

There was no proof as to the financial condition of the Davis Company prior to May, 1895, when it became openly insolvent. It did refuse to pay the notes held by the Anglo Company in 1893, but that was because it believed it had a good counter claim,

and when it lost the opportunity to assert that claim and judgment went against it, that judgment was promptly paid (p. 47). Other notes held by the Anglo-American in 1893 were paid, and when the Davis Company sued the Anglo in New York in June, 1894, the latter had no unpaid notes of the Davis Company, though it did have other claims then in suit in Illinois. No default of the Davis Company in payment of its business paper is shown until May 22, 1895 (p. 121).

Briefly stated, the Court below found as matter of fact that these claims in question were formally assigned to Weed, May 27, 1895; that such assignment was in pursuance of a prior oral agreement made in October, 1893, by which Weed loaned his credit to the Davis Company to the extent of $13,500 upon the security of the claims; that the transaction was in good faith and done to prevent the insolvency of the Davis Company; that the Anglo-American got the money which was so raised and that the New York judgment afterwards entered upon these claims nominally in favor of the Davis Company was actually in favor of Weed (opinion of Coxe, *J.*, pp. 130, 131).

As matter of law the court below decided that the Illinois judgment obtained by the Anglo-American Company in 1899 against The Davis Company cannot be used to pay the New York judgment obtained by Weed against the Anglo-American in 1895.

The assignments of error are numerous but they seem to raise only two questions.

FIRST—*Were the claims of the Davis Company, sued on in the New York action, actually and in good faith assigned to Weed, for a valuable consideration.*

SECOND—*If so, does Weed hold the judgment entered in the name of the Davis Company free from complainant's equity of set off, if such equity existed before the assignment.*

Before considering the questions raised relating to the merits there is a preliminary question as to the jurisdiction of the Circuit Court.

The appellees originally challenged that jurisdiction but their demurrer was overruled. Having succeeded in establishing their defense on the merits they might well enough be content to concede the jurisdiction of the Court which has decided in their favor. The question, however, is one which we assume the Court will consider and determine for itself, even if not raised by Counsel.

M. C. & L. M. R. R. Co. *vs.* Swan, 111 U. S., 379, 382.
Giles *vs.* Harris, 189, U. S., 475, 501.

Jurisdiction of the Circuit Court was maintained on the ground that this is a suit brought under the Civil Rights title of the Revised Statutes—section 1979—to redress the deprivation of the right to set off the Illinois judgment. (Opinion of Wheeler, p. 11).

Jurisdiction of suits brought under that title is in terms conferred on the Circuit Courts by R. S., section 629, paragraph 16.

If the demurrer were now before the Court for argument the following questions, among others, would arise:

1. Are sections 1977 and 1979 of the Revised Statutes, still in force?

See—

Holt *vs.* Indiana Mfg. Co., 176 U. S., 68.
Giles *vs.* Harris, 189 U. S., 475, 485.

2. Are they within the constitutional power of Congress to enact?

3. Is the right to set off judgments a "civil right," such as is intended to be secured by them?

Holt *vs.* Indiana Mfg. Co., 176 U. S., 68.

4. Is the right to sue in the courts of New York upon causes of action arising outside the State, as *e. g.*, upon an Illinois judgment, a "right, privilege or immunity," secured by the Constitution and laws, to a corporation foreign to the State of New York?

Blake *vs.* McClung, 172 U. S., 239.
Robinson *vs.* Oceanic Steam Nav. Co., 112 N. Y., 315.
Eingartner *vs.* The Illinois Steel Co., 94 Wis., 70.

5. Is a corporation entitled to claim the protection of section 1979?

(*a*) Is it a "citizen of the United States?"

(*b*) Is it a "person within the jurisdiction thereof?'

Blake *vs.* McClung, 172 U. S., 315.

6. In overruling the demurrer to the jurisdiction, WHEELER, *J.*, said (p. 12):

> "The plaintiff has been deprived of its right "of offset under color of that statute of the State, "and this suit is not at all framed to review in "any way the judgment by which this was done, "but for independent relief under these laws of "the United States provided for because of that "statutory deprivation."

If the denial of the right to set off the judgments in question be the denial of a civil right secured by the Constitution and laws so as to give rise to a suit in equity for redress under section 1979 of the Revised Statutes then, as the deprivation of such right is made criminal by section 5510 of the Revised Statutes, it would seem to follow that a crime has been committed. Who is the criminal?

If the Court should be of opinion that the suit is not within the jurisdiction of the Circuit Court as one

brought to redress a deprivation of civil rights, then is it one arising under the Constitution and laws of the United States, and so within the jurisdiction.

The bill alleges the unconstitutionality of section 1780, of the New York Code of Civil Procedure. But the case has been decided without touching that question.

In *Manhattan R'way Co.* vs. *New York*, 18 Fed. Rep., 195, WALLACE, *J.*, says:

> "A case does not arise under the Constitution "or laws of the United States unless it cannot "be decided without deciding a Federal ques- "tion."

The settled rule seems to be that to make a case within the jurisdiction upon this ground it must appear from the facts well pleaded in the plaintiff's statement of his own claim that the case is one arising under the Constitution or laws of the United States. The determination of a Federal question must be a necessary ingredient of the case as made by the bill.

Tennessee *vs.* Union & Planters' Bank, 152 U. S., 454.

New Orleans *vs.* Benjamin, 153 U. S., 411, 424.

McCain *vs.* Des Moines, 174 U. S., 168, 181.

Houston & Texas R. R. *vs.* Texas, 177 U. S., 66.

Whether the complainant is entitled to the set-off it seeks seems to depend upon general principles of equity and not upon any law of the United States or any provision of the Constitution. If so, then the case does not arise under the Constitution or laws of the United States.

Passing now to the merits.

ARGUMENT.

FIRST.

The assignment of the claims against the Anglo-American Company and Fowler Brothers, Limited, to defendant Weed was valid and effectual and for a valuable consideration.

The errors alleged by appellant attack the assignment to Weed both in fact and in law.

I. Errors of Fact Alleged.

(1) The second, third and fourth specifications challenge the fact of the transaction between Davis on the one side and Weed and the bank on the other, by which the bank agreed to loan, and did loan, to the Davis Company $13,500 on Weed's credit, the latter being secured by the claims then known to all parties to be asserted by the Davis Company against the Anglo. But the transaction, as found by the court, was proved by the testimony of the three parties who took part in it, and no testimony to the contrary was produced.

(2) The fifth and sixth specifications relate to the supposed knowledge on the part of Weed of the cross-claim then (*i. e.*, Oct., 1893), existing in favor of the Anglo-American and thereafter sued on by it in Illinois. But the court below was unable to find any proof of such knowledge in the record and none has been pointed out by the learned counsel for appellant. It is true that Weed became a director of the Davis Company in June, 1893, but this is hardly enough to charge him with actual knowledge of all prior transactions of the company. The largest part of the claims which went into the Illinois judgment did not accrue until August 19, 1893 (p. 29). But even if Weed were chargeable with knowledge of the fact that such claims

existed, it would not impeach the good faith of the transaction of October, 1893. The purchaser of a non-negotiable chose in action takes it subject to the equities then existing in favor of the debtor, but as we shall show below there was no equity of a set-off then existing in favor of the Anglo-American. Knowledge or ignorance on Weed's part was not material.

(3) The seventh specification so far as it questions the fact of the assignment is of course answered by pointing out the paper of May 27, 1897, and the seal of the Davis Company. The validity of that deed will be considered below.

(4) The eighth specification is similar to the seventh.

(5) The ninth and tenth specifications assert that because the Davis Company exercised acts of dominion over the claims after the agreement of October, 1893, therefore that agreement was invalid. The acts principally relied on, were pleading some of the assigned claims as a set-off in the Illinois action, and suing upon them in the New York courts. But the claims were only assigned to Weed as security and were on their face largely in excess of the amount for which he had a lien on them (p. 127). That the Davis Company exercised control over the claims, to the extent mentioned does not seem inconsistent with the fact that it had given Weed the lien upon them which he claimed.

(6) The twelfth specification seems to imply that the act of Weed in loaning his credit to the Davis Company was done for his own personal advantage; that he and not the Davis Company benefited by it There is nothing in the evidence to sustain this view of the case. Weed never claimed to hold the assigned claims except as security for the amount advanced the Davis Company on his credit.

We submit that there is no error in the record relating to the fact of the agreement of October, 1893, giving Weed a lien on the claims in question, or the formal performance of that agreement by the writing of May 27th, 1895.

II.—Errors of Law Alleged.

(1) The fourth assignment of error alleges that certain evidence received was incompetent. Granting that the copies of the notes produced were secondary, yet the error if any was harmless as the fact of the loan by the bank of $13,500 was otherwise established and the form of the paper was not material. The objection was not taken at the time the witnesses were examined (p. 48). Had it been the original notes would have been produced.

(2) The eighth assignment of error challenges directly the validity of the assignment to Weed.

The grounds upon which this is done seem to be:

(*a*) Want of authority in Davis to make it.

(*b*) Disability on the part of Weed to receive it.

(*c*) The insolvency of the company.

(*d*) Exercise of dominion over the subject matter by the assignors.

(a) *Davis had power to make the assignment in question.*

The power of Davis, who made the agreement of October, 1893, pledging the claims in question to Weed, and who executed that agreement by signing the paper of May 27, 1895, seems to be questioned, because there is no regular record of a resolution of the directors authorizing it.

The agreement for the loan was negotiated by Henry Davis, the president and treasurer of the Company (p. 48, 115). He was also, as president, the general manager of the Company at Albany and Plattsburgh (By-laws, p. 112, sec. 13). The ordinary course of business had been to leave to him the full management and control of the Company's affairs in the East, *i. e.*, New York, Albany and Plattsburgh. He attended to the finances of the Company, borrowing money and giving security (p. 72, 73). The directors met irregularly and at long intervals (p. 72). There can be no question of

the power of Mr. Davis, under the facts disclosed, to borrow the money and to make the agreement for security which it is shown he did make.

Peck *vs.* Dexter S. P. & P. Co., 164 N. Y., 127.

Mathews *vs.* Hardt, 79 App. Div. (N. Y.), 570.

In *Morawetz on Corporations*, sec. 509, it is said, quoting from a California decision:

> " The result of the cases seems to be, that where " the management of the affairs of a corporation is " intrusted to a managing agent, he has power to " assign the choses in action of the corporation to " its creditors, either in payment of, or as security " for the payment of, a precedent debt of the cor- " poration, without express authority from the " Board of Directors, and an assignment so made " is valid."

Power to pledge as security for a present loan would seem to exist *a fortiori*.

The corporation received the benefit of the loan. It was used to pay the judgment of this very complainant. A majority of its directors participated in the transaction. Plainly the Davis Company cannot question the validity of the agreement on which the loan was made. *A fortiori*, complainant, who is a stranger, cannot question it.

Castle *vs.* Lewis, 78 N. Y., 131, 135.

The subsequent formal written assignment to Weed of the claims in suit against the Anglo-American must be referred back to the original agreement to give it, and the rights of the parties under it are the same as if it had been given at the moment when the Bank,

relying upon Weed's credit, fortified by this security advanced the money.

Paulding *vs.* Chrome Steel Co., 94 N. Y., 334, 340.
Castle *vs.* Lewis, 78 N. Y., 131, 135.
Ledyard *vs.* Phillips, 58 Mich., 204, 208.
Matter of Rogers Co., 79 App. Div. (N. Y.), 419.

It matters not, therefore, if the evidence of the authority given Davis, as president of the Company, to make the written assignment to Weed, be informal or even defective, because the act done was one which the corporation was under a prior legal obligation to do. But we deny that evidence of proper corporate authority is lacking. By the by-laws of the Company all instruments in writing required the signature of the president and treasurer (p. 112, sec. 14). Davis filled both offices (p. 115). At the meeting of the directors held in Chicago in December, 1893, the president of the Company was authorized to assign and transfer any and all of the claims or causes of action of the Davis Company against Anglo-American or Fowler Brothers, and a formal resolution to that effect is among the corporate records and is in evidence (p. 118). At the same meeting an executive commitee was created consisting of the president and vice-president. Weed was vice-president. The general management of the business of the Company subject to the control of the full Board was vested in this committee, and it was authorized to hold its meetings outside the State of Illinois (p. 119). The testimony of Weed is that there was a meeting of the directors held at Plattsburgh shortly before the execution of the formal assignment to him, at which Mr. Davis and himself were present, the third director, Mr. Booth, having been notified but not attending. The full executive committee was present even if the full board was not. A resolution was passed directing the president of the Company to

execute a formal transfer of the claims to Weed (p. 62). Davis also swore that the execution of the assignment was pursuant to the order of the board of directors of the Company (p. 37). There is absolutely nothing tending to overcome this testimony except the fact that the record book of the Company contains no record of the meeting of the executive committee, or of the directors subsequent to June, 1893 (p. 71). The record of the meeting of December, 1893, was outside the regular record book, and was proved from the proceedings had in the action in the State court (p. 73). The reason for the defective condition of the record book is that Mr. Stobo, the original secretary, was removed from office at the meeting of December, 1893, and he thereupon took possession of the record book and refused to surrender it to his successor until compelled to do so by legal proceedings (pp. 72, 116, 120). It being shown that the record book contained no record of the meeting of the directors or executive committee in May, 1895, the parol evidence given by Weed was competent.

Mining Co. *vs.* Anglo-Californian Bank, 104 U. S., 192, 194.

The written assignment to Weed is under the seal of the corporation, attested by its president and proved in the manner required by the New York Law (Real Property Law, sec. 258). The corporate seal accompanied by this proof is alone *prima facie* proof of corporate authority.

Trustees of Canandarqua Academy *vs.* McKechnie, 90 N. Y., 618, 629.

There is no affirmative evidence whatever to overcome this *prima facie* proof. On the contrary, the records of the corporation show express authority given to its president to assign and transfer the property in question in December, 1893, and this authority was renewed at a meeting held only a few days before

the deed was executed, but of what was done at this latter meeting the proof is only by parol.

It may be objected that Weed was a director, and could not act as such to authorize a transfer to himself. Assuming that he took part in the meeting held just before the formal transfer to him was made—and unless he did there was no quorum—the corporate action was not thereby rendered void but, at most, voidable. No one can question it for this reason but the corporation itself or its stockholders. Clearly the corporation could not avoid the act, because it was in pursuance of the prior contract by which it was bound. And even if the contract for security could be avoided, it would only be done on condition of restoring to Weed or the Bank the money advanced on the faith of it.

Duncomb *vs.* N. Y., H. & N. R. R., 84 N. Y., 190, 199.

(*b*) *Disability of Weed to deal with the Davis Company.*

It is said that Weed was a director, and therefore prohibited from dealing with the Company.

But a director may lend money to his corporation and take security for it.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587.

Converse *vs.* Sharpe, 161 N. Y., 571.

Illinois Steel Co. *vs.* O'Donnell, 156 Ill., 624.

(*c*) *Insolvency of the Davis Company.*

The statutes of New York prohibiting transfers by insolvent corporations are invoked.

There is no finding or evidence that the Davis Company was insolvent in October, 1893. Conceding insolvency on May 27, 1895, when the formal assignment was made, yet as it was made in performance of the

prior agreement of October, 1893, it is not within the condemnation of section 48 of the Stock Corporation Law of New York.

Matter of Rogers Co., 79 App. Div., 419.
Paulding *vs.* Chrome Steel Co., 94 N. Y., 334.
Miller *vs.* Miller Knitting Co., 23 Misc. (N. Y.), 404.

There is nothing in the New York statute which prevents even an insolvent corporation from borrowing money and giving a valid security for it. It is only acts done in contemplation of insolvency, and which result in giving a preference, which are forbidden.

Dutcher *vs.* Importers & Traders Bank, 59 N. Y., 5.
O'Brien *vs.* East River Bridge Co., 161 N. Y., 539, 548.

The Illinois law is the same. A director of an insolvent corporation may lend it money and take security which will be valid against its creditors.

Illinois Steel Co. *vs.* O'Donnell, 156 Ill., 624.

No question arises under the Bankrupt Law as all transactions took place before 1898.

(*d*) *Exercise of dominion by assignee.*

It is said The Davis Company used the claims as a set-off in Illinois, and sued on them in its own name, thereby exercising dominion over them. But this exercise of dominion by a pledgor over the thing pledged does not defeat the pledge or render it fraudulent as to creditors of the pledgor.

Stackhouse *vs.* Holden, 66 App. Div. (N.Y.), 423.

The doctrine of *Christmas* vs. *Russell* (14 Wall, 69) is invoked. But the alleged acts of dominion were before the transfer to Weed of the legal title to the

claims. In the assignment of May 27, 1895, no right of revocation or control was reserved to the Davis Company.

But we submit that the doctrine of *Christmas* vs. *Russell* and kindred cases does not apply to an agreement to give security based on a present valuable and adequate consideration.

See Matthews *vs.* Hardt, 79 App. Div. (N. Y.), 570.
Matter of Rogers Construction Co., 79 App. Div. (N. Y.), 419.
Risley *vs.* Phenix Bank, 83 N. Y., 318.

The agreement, therefore, between the Davis Company by its president and general manager on the one side and the Bank and Weed on the other, that the claims in question should be held as security for the loan and to protect Weed against his indorsement, was valid. Weed and the Bank, having executed it on their part by advancing the money thereby acquired a good equitable lien on the subject-matter—the claims against the Anglo-American—and became entitled in equity to have the same specifically enforced.

Jones on Liens, secs. 77, 78.

In every aspect of the case therefore Weed and the bank acquired the equitable title to the claims in question by force of the agreement of October 1893, and this equitable title was made a legal title in Weed by the formal assignment of May 27, 1895. The judgment subsequently entered in the name of the Davis Company was the property of Weed. It is true that both the claims assigned and the judgment obtained on them were held as collateral security for the debt due the bank, $10,000, but this debt exceeds the amount of the judgment in question, together with the amount realized on the Mark J. Davis judgment, $3,026 (pp. 39, 40, 69), when the costs and expenses of the litigation, which must be first paid out of the fund, are considered.

The defendant Weed and the bank are therefore entitled to be considered as purchasers in good faith and for value of the claims in question, and of the judgment sought to be in part extinguished by set-off.

SECOND.

The case made by the bill is for a set-off of judgments.

The bill alleges that the complainant is a creditor of the Davis Company by force of the judgment which it has obtained in Illinois. This judgment was not obtained until January, 1899. At that time the opposing judgment was and for more than three years had been the property of defendant Weed under the agreement of October 1893 and the assignment to him of May 27, 1895. The right to set off one judgment against another does not arise until the entry of judgment in the second action. It follows that if before the entry of the second judgment the opposing claim or judgment is assigned in good faith to a third person, the latter will hold it free of any right of the judgment debtor to set off his subsequent *judgment*.

Graves *vs.* Woodbury, 4 Hill (N. Y.), 559.
Spencer *vs.* Barber, 5 Hill (N. Y.), 568.
Mackey *vs.* Mackey, 43 Barb. (N. Y.), 58.
Prouty *vs.* Swift, 10 Hun (N. Y.), 232.
Roberts *vs.* Carter, 38 N. Y., 107.
Perry *vs.* Chester, 53 N. Y., 243.

In *Mackey* vs. *Mackey* (43 Barb., 58) it is held:

"The equity to have one judgment set off against "another cannot arise until judgment is actually "recovered in the second action. An assignment "made previous to that event, transferring a legal, "or even an equitable title, to the demand will "have the effect of preventing the right of set-off "from accruing."

Prouty vs. *Swift & Burt* (10 Hun, 232) was a suit to set off judgments. The facts were much the same as in the present case. Each party had obtained a judgment against the other, but the claim of Swift and the judgment thereon had been assigned to Burt before Prouty got final judgment. The Court says (p. 234):

> "The assignment, therefore, vested in Burt an "absolute right, and when the judgment of the "plaintiff herein was finally entered against Swift, "the latter had no judgment in his favor, for, as we "have seen, it had been assigned long before to "the defendant Burt. It had, indeed, never been "the property of Swift, for, as we have seen, the "report of the Referee, on which it was based, was "transferred and became the property of Burt be- "fore it was taken up. As the right to set off judg- "ments does not accrue until judgment has been "perfected, the *bona-fide* assignment, previous to "judgment, will cut off the right to have such "judgment set-off against the party in whose favor "it was rendered (Perry *vs.* Chester, 53 N. Y., "243; Mackey *vs.* Mackey, 43 Barb., 58; Roberts "*vs.* Carter, 38 N. Y., 107)."

The rule that the right to set-off one judgment against another does not arise until the second judgment is perfected, is a necessary corollary of the rule that a judgment merges the cause of action on which it is recovered, and is itself a new cause of action. The settled rule is:

> "The cause of action, though it may be examined "to aid in interpreting the judgment, can never "again become the basis of a suit between the "same parties. It has lost its vitality; it has "expended its force and effect. All its power "to sustain rights and enforce liabilities has "terminated in the judgment or decree. It is

" ' drowned in the judgment ' and must henceforth
" be regarded as *functus officio.*"

Freeman on Judgments [4th ed.] Sec. 215.

It follows that if an action be brought against a defendant who has a cross-claim which he might set-off and the defendant, instead of using his claim as a set-off, brings a cross action thereon and gets judgment first, he cannot use that judgment as a set-off in the first action, for it did not exist when the action was brought; neither can he set-off his original claim, for it is merged in the judgment.

Lowell *vs.* Lane, 33 Barb. (N. Y.), 292.
Ives *vs.* Goddard, 1 Hilton (N. Y.), 434.
Mizell *vs.* Moore, 7 Ired. Law (N. C.), 255.
Andrews *vs.* Varrell, 46 N. H., 17.
Barber *vs.* Baker, 70 Mo. App., 680.

The complainant recognized the rule that a *bona fide* assignment before judgment prevents a set-off, and sought to avoid it by alleging that the assignment to Weed was without consideration; in fraud of its rights and void so far as it was concerned. The allegations of the bill in this respect are denied by the answer; the proofs wholly failed to sustain them, and the Trial Court has found against them.

It will, of course, be urged that the assignee of a non-negotiable chose in action takes it subject to all equities. This may be conceded, but the equities which a debtor may assert against the assignee are only those which existed in his favor *at the time of the assignment.* If the *judgment* against the Davis Company had been actually entered in favor of complainant at the time of the assignment to Weed—either in October, 1893, or May, 1895—it may be that he would have taken subject to the right to set off that judgment. But when Weed became the owner of the claim against complainant there was no equity then existing to set off judgments, for complainant had no judgment.

It will no doubt be argued in reply that the complainant's *claims* against the Davis Company existed and were in suit and that an equity to set off the subsequent judgment may be based upon them. The answer is that no such case is made by the present bill. The complainant rests upon its judgment and upon that alone. All claims which were in suit are, of course, merged in the judgment, and the bill relies on that as the foundation of the suit. Had the complainant alleged its original claims against the Davis Company and tendered to defendant Weed an opportunity to contest them, then perhaps an equity founded upon them might have been asserted. Instead of doing this the complainant by relying on its judgment forecloses inquiry into the merits. Complainant cannot be allowed to say as against defendant Weed, that its claims have been liquidated and established by judgment, and at the same time assert against him an equity not founded on that judgment. Of course, the Illinois judgment establishes nothing as against Weed. He is not a party to it. He claims nothing under it. His rights, whatever they are, were vested in him long before it was rendered. If now these rights are to be prejudiced, by reason of equities alleged to have existed anterior to the judgment—that is the claim upon which the judgment was founded—it can only be done by giving him an opportunity to contest the validity of the claim on which the equity is asserted. But the present suit is not framed for any such purpose. It asserts reciprocal judgments merely, and the judgment, which is legally and equitably the property of defendant Weed, cannot be extinguished by setting off against it a judgment to which he is not a party, and which was not in existence when his judgment was recovered.

THIRD.

No case is made either by the pleadings or the proofs to restrain the enforcement of defendant's judgment at law.

The bill alleges that the Illinois judgment in favor of complainant arose out of the same transactions as those which gave rise to the judgment now held by defendants (p. 3). The answer denies this and alleges that it arose out of separate and distinct contracts (p. 14, par. IV.).

. The proofs sustain the answer.

A comparison of the bill of particulars in each action will show the demands asserted by the one party to have been entirely separate and distinct from those set up by the other (see statement in Illinois action, p. 29; Bill of Particulars in New York action, p. 85).

Taking the complainant's own version of the matter, however, and it is plain that the cause of action sued on in Illinois might have been set up as a counter claim in the New York action.

The statute law of New York relating to set-off is now contained in the Code of Civil Procedure under the name of counter-claim, as follows:

> Sec. 500. The answer of the defendant must contain:
>
> 1. * * * * *
>
> 2. A statement of any new matter constituting a defense or counter-claim.
>
> Sec. 501. The counter-claim specified in the last section must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or in a proper sense, against the person whom he represents, and in favor of the defendant, or one or more of the defendants between whom and the plaintiff a separate judgment may be had in the action:
>
> 1. A cause of action arising out of the contract or transaction set forth in the complaint

as the foundation of the plaintiff's claim or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action

The general rule is:

"A Court of Equity does not interfere with "judgments at law, unless the complainant has "an equitable defense of which he could not avail "himself at law, or had a good defense at law "which he was prevented from availing himself "of by fraud or accident, unmixed with negligence "of himself or his agents."

Gray, *J.*, in Knox County *vs.* Harshman, 133 U. S., 154.

Savage *vs.* Allen, 54 N. Y., 458.

Pond *vs.* Harwood, 139 N. Y., 111.

This rule applies when the equity upon which relief is asked grows out of a set-off which might have been but was not interposed in the action at law. In such case the party is held to have waived his right to set-off and cannot afterwards assert it.

Hendrickson *vs.* Hinckley, 17 How. U. S., 443.

U. S. Bung Mfg. Co. *vs.* Armstrong, 34 Fed. Rep., 94.

Greene *vs.* Darling, 5 Mason, 201.

In the case first cited, Hinckley sued Hendrickson at law. The latter had a good set-off, but thinking his other defense was sufficient did not interpose it. Hinckley got judgment. Hendrickson then filed his bill in equity to have the set-off allowed, alleging that Hinckley was a non-resident of the State and had no property therein. A demurrer to the bill was sustained.

CURTIS, *J.*, says (p. 446):

"It is suggested that Courts of Equity have an "original jurisdiction in cases of set-off, and that

"this jurisdiction is not taken away by the statutes "of set-off, which have given the right at law. "This may be admitted, though it has been found "exceedingly difficult to determine what was the "original jurisdiction in equity over this subject "(2 Story Eq., 656, 664). But whatever may have "been its exact limits, there can be no doubt that "a party sued at law has his election to set off his "claim, or resort to his separate action. And if he "deliberately elects the last, he cannot come into "a court of equity and ask to be allowed to make "a different determination, and to be restored to "the right which he has once voluntarily waived. "Similar considerations are fatal to the plaintiff's "claim for relief, on the ground that defendant "resides out of the State. * * * When the "complainant elected not to file these claims in "set-off in the action at law, he knew that defend- "ant * * * resided out of the State. If that "fact was deemed by the complainant insufficient to "induce him to avail himself of his complete legal "remedy, it can hardly be supposed that it can "induce a court of equity to interpose to create "one for him. The question is not merely whether "he now has a legal remedy, but whether he has "had one and waived it. And as this clearly ap- "pears, equity will not interfere."

Neither does the insolvency of the creditor in the action at law change the rule.

Beach, Equity Jurisprudence, sec. 665.
Barker *vs.* Elkins, 1 John Ch., (N. Y.), 465.
Wolcott *vs.* Jones, 4 Allen (Mass.), 367.
Sayre *vs.* Harpold, 33 W. Va., 553.
Greene *vs.* Darling, 5 Mason, 201.
Howe *vs.* Sheppard, 2 Sumner, 409, 414.
Jackson *vs.* Bell, 31 N. J. Eq., 554; affirmed, 32 N. J. Eq., 411.

In *Wolcott* vs. *Jones* (4 Allen, 367), the Court held:

> "A bill in equity cannot be maintained to re-
> "strain the collection of an execution against the
> "plaintiff in favor of the assignee of an insolvent
> "debtor on the mere ground that the plaintiff has
> "claims against the debtor which might be the
> "subject of set-off, there being no averment to
> "show that the plaintiff, for any reason, could not
> "have availed himself of his right of set-off in the
> "action in which the judgment against him was
> "recovered."

The case of *Sayre* vs. *Harpold* (33 W.Va., 553), was very similar to the case at bar.

Sayre had a three months' note made by Harpold in 1878. A cause in action accrued in favor of Harpold against Sayre in 1879, and in 1883 he brought suit on it in Missouri. The action was removed to the Federal court. Sayre defended, denying all liability but saying nothing of the note. Harpold got judgment in the Federal court and then brought an action on it against Sayre in West Virginia. Sayre then filed a bill to restrain the action and to have his note allowed as a set-off. Harpold was a non-resident and insolvent.

Held that the bill should be dismissed, SNYDER, *J.*, saying, p. 558:

> "The question then arises: Does the fact that
> "the plaintiffs in the judgment at law are insolvent
> "entitle the plaintiff here to relief which he would
> "not be entitled to if they were solvent? If the
> "claim had been a payment instead of a set-off, the
> "solvency or insolvency of the plaintiff in the
> "judgment would be wholly immaterial, because
> "it would be lost in either event. If that is true
> "in regard to a payment it is equally true in re-
> "spect to a set-off, for the cases make no distinction
> "between payments and set-offs. The default of the

" party complaining and not the circumstances of
" the plaintiff in the judgment is the criterion upon
" which equity refuses relief."

Unless, then, there was some legal obstacle which prevented the Anglo-American Company from setting up its claim against the Davis Company in the action at law in the state court, it is not now entitled to relief in equity by reason of that claim.

(*a*) The bill of complaint in the present suit alleges no such obstacle. On the contrary, by alleging that the claims which were the foundation of each action at law arose out of the same transaction, it impliedly asserts that the one might have been set-off against the other.

(*b*) The fact that the Anglo sued first in Illinois does not change the rule. An action pending in the courts of another state cannot be pleaded in abatement to an action between the same parties for the same cause here.

Bowne *vs.* Joy, 9 John, 221.
Douglas *vs.* Phenix Insurance Co., 138 N. Y., 209, 218.
Stanton *vs.* Embree, 93 U. S., 548.

(*c*) The fact that the New York action was against both the Anglo-American Company and Fowler Brothers, Limited, did not prevent the assertion of a counter claim by the Anglo. A separate judgment might have been and in fact was recovered in that action against the Anglo (Code, sec. 501). More than this, the present complaint alleges that the judgment in the action at law went against both corporations, because, as regards the Davis Company the two were identical.

FOURTH.

The right, if any, which the Anglo-American Company had to reduce its liability on the claims of the Davis Company against it, by reason of a cross liability in its favor, did not survive the assignment of the Davis Company's claim to Weed, and the entry of judgment thereon.

There are two points of view from which to consider this proposition; *first*, assuming the claim of the Anglo-American to have been available as a counter claim in the action brought by the Davis Company; *second*, assuming that it was not so available.

(1) AVAILABLE AS A COUNTER CLAIM.

It is manifest on this assumption that the Anglo, by omitting to set up the claim in its own favor as a counter claim, waived the right to the remedy it now seeks, and the case is that presented by the above point, namely, that a Court of Equity will not enjoin a judgment to let in a set-off which might have been but was not pleaded at law.

That the right to a set-off may be waived is clear. It seems equally clear that it is waived by not pleading it.

Gutchess *vs.* Daniels, 49 N. Y., 605.
U. S. Bung Mfg. Co. *vs.* Armstrong, 34 Fed. Rep., 94.
Greene *vs.* Darling, 5 Mason, 201.

In *Gutchess* vs. *Daniels* (49 N. Y., 605), there was an express agreement waiving the set-off, but the language of the Court applies equally to an implied waiver.

ALLEN, *J.*, says (p. 608):

"The right of set-off in the case of cross debts "is given by law for the benefit of parties having

" mutual dealings and to avoid a multiplicity of
" actions. It is a proceeding by which equity can
" be done between suitors at law. But, like every
" other benefit or privilege conferred by law, it
" may be waived by the party entitled to it. In
" courts of law a defendant may set off any claim
" which he has against the plaintiff, which is within
" the statute of set-off, or bring an independent
" action, at his election. * * * All that the
" party waiving the right to set off a demand
" against the claim of the plaintiffs, in an action in
" which it is allowable, or (by) omitting to exer-
" cise it, loses, is that one remedy for the collec-
" tion or satisfaction of his debt."

In *United States Bung Manufacturing Company* vs. *Armstrong* (34 Fed. Rep., 94), the plaintiff was indebted to the Fidelity Bank on a note, and, after the insolvency of the bank, paid it to Armstrong as its receiver. It then brought suit to have its own claim against the bank allowed as an equitable offset. Defendant's demurrer was sustained, JACKSON, *J.*, saying :

" Complainant's right of set-off was waived or
" abandoned by its payment of the note described
" in the bill. * * *

" If complainant had intended to rely upon its
" debts against the Fidelity National Bank as a set-
" off against its note, it should have declined pay-
" ment of the note, stood suit thereon, and set up
" its counter-claim as a set-off. * * *

" It " (the bill) " discloses nothing more than the
" existence of cross-demands or independent debts
" which could have been set off at law if complain-
" ant had asserted its right to do so at the proper
" time and in the proper mode. Having volun-
" tarily waived or abandoned this legal right and
" remedy by paying the note to avoid being sued

" thereon, it presents no case for equitable relief
" by way of equitable set-off."

In the present case the Anglo-American had full knowledge of its own claims against the Davis Company when the latter company began its action in the state court. It also had knowledge of the insolvency of the latter company before any of the claims on either side had passed into judgment and had ample time to apply to the court to relieve it from its ommission to plead its counter-claim. Had it then doubted the sufficiency of its other defense, or its ability to collect its judgment in Illinois, it ought to have applied to amend its pleadings (see Fabricotti *vs.* Saunitz, 3 Sandf., Sup. Ct., 743). But it elected to prosecute its own action in Illinois, and ought now to be held to that election. Illinois is the home of both corporations. By its judgment in that State it has secured whatever benefits may accrue to a local creditor by reason of a judgment.

(2) Not Available as a Counter-claim.

If the claims of the Anglo-American could not have been interposed as a counter-claim to defeat or reduce the claims of the Davis Company, then it is not easy to see what equity to a set-off existed which would attach to the judgment thereafter entered against the Anglo, and which, when entered, was both legally and equitably the property of Weed. The rule seems to be established, both in equity and at law, that if A has a demand against B, which is in suit, and B has a cross-demand against A, but of such nature that it is not then available as a set-off or counter-claim to A's suit, whether because it has not yet matured or is unliquidated or sounds in tort, and A, actually and in good faith assigns his cause of action, the assignee will hold such claim, and the judgment subsequently

entered on it, free from any claim of set-off on the part of B.

Hackett *vs.* Connett, 2 Edw., Ch. (N. Y.), 73.
Graves *vs.* Woodbury, 4 Hill (N. Y.), 559.
Prouty *vs.* Swift, 10 Hun (N. Y.), 232.
Keep *vs.* Lord, 2 Duer. (N. Y.), 78.
Myers vs. Davis, 22 N. Y., 489.
Roberts *vs.* Carter, 38 N. Y., 107.
Perry *vs.* Chester, 53 N. Y., 240.
Martin *vs.* Kunzmuller, 37 N. Y., 397.
Fera *vs.* Wickham, 135 N. Y., 223.
Pardo *vs.* Osgood, 2 Abb. Pr., N. S. (N. Y.), 365.
Nash *vs.* Hamilton, 3 Abb. Pr., N. Y., 35.

The case of *Hackett* vs. *Connett*, 2 Edw., Ch. 72, is in point. It was a bill in equity to procure the set-off of judgments. Hackett got two judgments for costs against Connett on the dismissal of two chancery suits. While the chancery suits were pending, and before any costs had accrued, Connett sued Hackett at law. After the decree for costs had been rendered against Connett, and before judgment in his action at law, Connett assigned his claim against Hackett, and judgment was subsequently entered in favor of the assignee. Hackett then sued to set off the judgments. Connett was insolvent.

McCoun, *V. C.* (p. 76):

> "Another difficulty existed in relation to a set-
> " off in the suit at law. Hackett's right to costs
> " in the chancery suits had not then become per-
> " fect by decree so as to form debts in his favor
> " until after the commencement of the suit at law
> " against him. In order to make a debt or demand
> " a set-off it must have existed at the time when
> " the suit was commenced. * * * But the
> " moment a judgment was obtained in the action a

" right to a set-off founded upon the equity of the " statute, attached; unless the assignment to Alcock " of which notice had been given prevented it. The " chose in action was capable of being assigned " * * *. The consideration for the assignment " * * * was a prior indebtedness to the de- " fendants Price & Sears for costs and professional " services * * * and an old debt to the de- " fendant Alcock * * *; and the avowed object " of the assignment was to secure and pay their " debts. * * *

" Even although we assume the assignment to " have been made in good faith, yet it must be ad- " mitted that the assignee could only take subject " to whatever rights or equities then existed in " favor of Hackett against Connett. What, then, " were those rights and equities? The defendant " at law was at liberty to make the same defense to " the action as he could have made if no assign- " ment had been executed. * * * But he could " make no set-off. The right had not attached. " Although by this time the costs in Chancery * * * " might have ripened into a debt, still the forms of " law did not permit him to make it a set-off upon " the trial. Nor did it operate *pro tanto* as pay- " ment or compensation for the damages claimed " in the suit. Neither had he then any right in " equity to a set-off. The Court of Chancery ex- " tends the principle no further than a court of law " under the statute of set-off (Duncan *vs.* Lyon, 3 " John Ch., 351). Although Chancery has some- " times exercised the power of decreeing a set-off " before or independently of the statute, it has " only done so where mutual debts existed and " where there was either an express or implied " agreement of stoppage *pro tanto* or mutual credit. " Here at the time of the assignment there were " not mutual debts, much less a mutual credit."

In *Graves* vs. *Woodbury*, 4 *Hill*, 559, the case of *Hackett* vs. *Connett* was adopted and followed.

COWEN, *J.*, says, page 562:

> "The case is, I think, within the principle of "Hackett *vs.* Connett. There the defendant had a "demand against the complainant which was in- "capable of being countervailed by a set-off, "because such demand was unliquidated. Pend- "ing suit he assigned it to Alcock, who obtained "judgment. Whereupon the complainant filed his "bill to compel a set-off of the judgment against "previous decrees for costs in his favor on the "dismissal of bills filed by Connett. Vice-Chan- "cellor McCoun held that the assignee having "taken the demand before any right to set off the "decrees existed, had acquired a claim paramount "to that of the assignor; and on that ground "denied the relief prayed for."

The Hackett case was again followed or quoted with approval in Pond *vs.* Harwood, 139 N. Y., 111, 119.

The rule is the same in other States.

Hovey *vs.* Morrill, 61 N. H., 9.
Ledyard *vs.* Phillips, 58 Mich., 204.
Ullman *vs.* Kline, 87 Ill., 268.
Ames *vs.* Bates, 119 Mass., 397.

In the New Hampshire case cited Morrill sued Hovey and pending the suit assigned his claim to pay an existing debt. Morrill was insolvent at the time and Hovey held his note. After judgment in Morrill's suit against Hovey the latter sued Morrill on the note and got judgment and brought this suit for a set-off. The set-off appears to have been allowed, but on the theory that the assignment was colorable only and a fraud on plaintiff.

ALLEN, *J.*, says (p. 13):

"In exercising the power of setting off mutual "judgments the real and not the nominal par- "ties are considered; and if one judgment has "been, in good faith and for a valuable considera- "tion, assigned to a third person before applica- "tion for a set-off is made, such third person is "the real party in interest, and no set-off can "ordinarily be allowed."

It has also been applied in the Federal courts.

Howe *vs.* Sheppard, 2 Sumner, 409.

In the case cited STORY, *J.*, said (p. 418):

"Where there are mutual debts which may be "set off in law or in equity, I take it to be clear "that the right of set-off is extinguished by a *bona* "*fide* assignment of one of the debts."

The cases are thus summed up in *Freeman on Judgments*, section 427:

"But if a judgment has been in good faith and "for a valuable consideration assigned to a third "person before application for a set-off is made, "such a third person is the real party in interest, "and no set-off can ordinarily be allowed."

FIFTH.

No case is made by the proofs for a set-off under the general rules of equity.

Relief in equity by way of set-off, and independent of statute, is not ordinarily granted in cases of merely reciprocal demands, even though one party be insolvent. It must, in addition, be made to appear that the two demands arose out of the same transaction, or were so connected that the party seeking the set-off may justly claim that he gave credit to the other by reason of the existence of his own debt, and under such

circumstances that an agreement to use the one debt to pay the other may fairly be implied.

Story, Equity, sec. 1435.
Snell, Principles of Equity (12th English Ed.), 596.
Scott *vs.* Armstrong, 146 U. S., 499, 507.
Hatch *vs.* The Mayor, 82 N. Y., 436, 442.
Greene *vs.* Darling, 5 Mason, 201.
Gordon *vs.* Lewis, 2 Sumner, 151.
Howe *vs.* Sheppard, 2 Sumner, 412.
Gordon *vs.* Lewis, 2 Sumner, 628.

The general doctrine is stated in *Snell's Principles of Equity* as follows (12th Eng. Ed., p. 595).

> "As regards connected accounts * * * the "law always was that the balance only of the ac- "counts was recoverable both at law and in equity; "and that was a virtual set-off between the "parties; and such set-off was available at law, "even as against agents (such as factors) trading "ostensibly as principals; and the Courts of "Equity followed in general the Courts of law, "as regards set-off, so that if there was no connec- "tion between the demands the rule in equity was "as at law—that is to say, if the accounts were "*unconnected* there was no set-off either at law or "in equity, but if the demands were connected "there was a set-off. However, the Courts of "Equity went beyond the law, and by virtue of "their general jurisdiction granted relief in the "cases even of reciprocal independent debts *pro-* "*vided there was a mutual credit*—that is to say, in "all cases where there was an existing debt due "to one party and a credit by the other party "founded on and trusting to such existing debt as "the means of discharging it. * * * But the "mere existence of reciprocal debts without such "mutual credit was not even in a case of insol- "vency sufficient to have sustained a set-off."

In *Scott* vs. *Armstrong* the controversy was between a solvent bank and the receiver of an insolvent bank. The receiver had recovered judgment in the Federal Court at law against the solvent bank. A set-off claimed by the solvent bank had been rejected because of the rule of Federal practice excluding equitable defenses in actions at law. The solvent bank then filed its bill for a set-off. It was held that the action of the law court in rejecting the set-off was right, but *because the claim of the solvent bank arose out of the same transaction as* that on which it had been cast in judgment equity would allow the set-off.

FULLER, *C. J.*, says (p. 507):

> " Courts of equity frequently deviate from the
> " strict rule of mutuality when the justice of the
> " particular case requires it, and the ordinary rule
> " is that where the mutual obligations have grown
> " out of the same transaction, insolvency on the
> " one hand justifies the set-off of the debt due upon
> " the other."

In *Carr* vs. *Hamilton*, 129 U. S., 252, 262, the question arose between the trustees of an insolvent life insurance company and a policy-holder who had borrowed money of the company on mortgage. Suit was brought to foreclose the mortgage and the policy-holder asked to set off the value of his policy, and his claim was allowed on the theory that when a policy-holder borrows money of his insurer it will be presumed that he does so on the faith of the insurance and in the expectation of meeting his own obligation with the obligation of the company to him.

In *Hatch* vs. *The Mayor*, 82 N. Y., 436, an award of damages had been made against the City for opening a street. Assessments had been laid in favor of the City upon the same property apparently for benefits done the same property by the same opening. The City had applied the assessments in part payment of the

damages. The party entitled to the damages sued to recover them.

FOLGER, *C. J.*, says, p. 441:

"There is another consideration that has pressedus much. That is whether there did not exist in the City a right to a stoppage of the money applied by it to the payment of assessments upon the premises or some of them. * * * It is to be inferred that the work for which these assessments were laid was for the benefit of this property for the damage to which this award was made. It is probable that one of them was for the benefit of this property by the very change of grade for the damage by which this award was made. The first impulse is to say that there is a natural equity that the benefits done to the property should be paid for from the award for the damages done to it. But equity goes upon fixed principles; and it does not allow a set-off or a stoppage unless this is a recognized rule of law or a recognized equitable reason that requires it. The data furnished by the case are not full and definite enough to say that such a rule or reason exists.

* * * * * *

"Equity does not interfere to declare a set-off or a stoppage unless there is one debt contracted on the faith of another; or an agreement between the parties that the one should be discounted from the other; or that there is a rule of law on which to base its action; or some intervening equity that renders the interposition of the Court necessary for the protection of the demand."

In *Greene* vs. *Darling*, 5 Mason, 201; *Gordon* vs. *Lewis*, 2 Sumner, 151; *Howe* vs. *Sheppard*, 2 Sumner,

412, and *Gordon* vs. *Lewis*, 2 Sumner, 628, this equitable doctrine of set-off was much considered by Mr. Justice STORY. In the last of these cases he says (p. 634):

> "To justify a court of equity in allowing a set-
> "off there must be some original or intervening
> "equity between the parties beyond the mere fact
> "of mutual debts. There must be a mutual credit
> "founded on a subsisting debt on the other side,
> "or an express or implied agreement for a set-off
> "of mutual debts."
>
> * * * * * *
>
> "The sole equity now set up is the insolvency
> "of John Gordon. But I am not satisfied that
> "mere insolvency alone constitutes a ground for
> "the interference of the Court. On the contrary,
> "it appeared to me in *Howe* vs. *Sheppard*
> "(2 Sumner, 628) there was no sufficient authority
> "to establish that doctrine."

The complainant in framing its bill in the present suit recognized this rule and sought to comply with it by alleging that the debts on which the respective judgments were recovered both arose out of the same transaction. But the proofs do not sustain the pleading. The "transaction" out of which the debt due complainant principally arose was a sale of grain in 1893—$2,400—(p. 29). The claims of the Davis Company extend back to 1888, and practically all accrued before 1893 (p. 85).

It is true that Mr. Fowler, president of complainant, testified in response to the direct question that the one judgment arose out of the same transaction as the other (p. 43). The question was clearly incompetent, and on cross-examination he explained that what he meant by the same transaction was the running account between the two companies (pp. 44, 45).

The manner in which the two companies did business with each other might have afforded some justification for a claim of "mutual credit" were it not for the way in which the claims of the Davis Company were treated by the Anglo-American. The latter company refused to recognize them; attempted through its control of the Davis Company to compel the latter to abandon them and refused to consider them when in December, 1892, the two companies had a settlement. In short, the complainant has from the beginning denied and disputed the validity of the claims made by the Davis Company, and which are the foundation of the present judgment. Mr. Fowler as a witness in this suit has testified that at the time of the transaction which gave rise to the action in Illinois he knew that the Davis Company made claims against the Anglo-American, but that the latter company denied their validity and refused to recognize them (p. 45).

Under these circumstances it would be idle to claim that the complainant gave credit to the Davis Company because of the existence of these claims, or that any just expectation on its part will be disappointed if compelled to pay in money a debt which it has always refused to recognize.

Even if the insolvency of the Davis Company would be ground for equitable interference as between the original parties, yet it cannot be urged as an equity against Weed because at the time his rights accrued the Davis Company was *not* insolvent. Assuming that Weed took subject to all equities, yet there was then no equity of set-off on the ground of insolvency.

Insolvency of the debtor is no equity on which to found a set-off as against the debtors' assignee, unless it existed at and before the assignment.

Henderson *vs.* McVay, 32 Ala., 471.
Robbins *vs.* Holley, 1 Mon. (Ky.), 191.

SIXTH.

The case made by the bill of complaint wholly fails.

The complainant is, of course, entitled to relief only according to the allegations of its bill. The theory of the bill is that the debts which underlie the judgments sought to be set off, both arose out of the same transaction; that the transfer to the defendant Weed was without consideration and with full knowledge of plaintiff's rights; and that it is void as against the complainant (p. 4). The effect of these allegations, if established, is that the Davis Company is still the owner of the judgment. The answer is under oath, and denies absolutely these charges of the bill (pp. 15, 16). These denials are responsive, and they can be overcome only by the testimony of two witnesses on behalf of the complainant, or by one witness and corroborating circumstances.

Story, Equity, sec. 1528.
Vigel *vs.* Hopp, 104 U. S., 441.
Southern Development Co. *vs.* Silva, 125 U. S., 247.

The complainant has wholly failed to comply with this rule. Only one witness was sworn on its behalf—Anderson Fowler—and he was not examined as to any matter at issue except the origin of the two debts, and his testimony on this point sustains the answer rather than the bill. It must therefore be taken as true that the two debts did *not* arise out of the same transaction; that the assignment to Weed was for a valuable consideration, in good faith, and without notice of any right of set-off claimed by complainant. The whole equity of the bill fails. A decree can be made only according to both allegations and proofs, and in the present case what is alleged is not proved.

SEVENTH.

The equities of Weed as a purchaser in good faith and for value are superior to those of the complainant.

1. *They are prior in time.*

The purpose of the suit is to set-off judgments.

Such relief ought not to be granted if it will infringe on equities of equal or superior grade.

In Black on Judgments, section 954, it is said:

> "A considerable proportion of the authorities "take the broad ground that the right to set-off "judgments is permitted only where it will in- "fringe on no other right of equal grade, and "further, that an assignment of one of the judg- "ments destroys that mutuality which is an "essential condition to the right to set-off and "consequently that this equity will not be per- "mitted to affect an assignee for value and in good "faith."

The equitable title of defendant Weed and the Bank originated in October, 1893, when the one loaned its money and the other his credit on the faith of the claims which are now in judgment against the complainant. At this time there was of course no equity to set-off a judgment against the claims, for no judgment existed. The equitable title of Weed and the Bank to the claims against the Anglo-American, became a legal title in Weed on May 27, 1895, and passed into judgment in December, 1895, and at this time no equity to set-off *judgments* existed. If the equity of set-off be founded on the insolvency of the Davis Company then it did not come into existence until after Weed's equity had attached. There is nothing in the record to show insolvency of the Davis Company until

long after October, 1893 (p. 130). Insolvency creates no equity for a set-off as against an assignee unless it existed at the time of the assignment.

Henderson *vs.* McVay, 32 Ala., 471.

During the three years subsequent to the judgment against the complainant, Weed, as the owner of that judgment, held it free from any claim of set-off. It is true he was prevented by appeal from exercising his rights and collecting the judgment, but had any claim for set-off been then made based on the disputed and unliquidated debt in suit in Illinois it must have been denied.

Hendrickson *vs.* Hinckley, 17 How., 443.

How can it be claimed that the entry of judgment in Illinois in 1899 against the Davis Company operated to subject Weed's property—the New York judgment—to an equity from which it had been clear for at least three years? How can it be said that the delay of the New York court in disposing of the appeal operated to deprive Weed of the right of collecting his judgment? The maxim is that "the act of the law shall harm no one," and yet if it had not been for the delay of the Court Weed would have collected his New York judgment before the Illinois judgment, which is the foundation of the present suit, existed.

2. *The defendant, by its conduct with reference to its claims against the Davis Company, has waived the equity (if such equity ever existed) of setting them off against the claim and judgment assigned to Weed.*

(*a*) It declined to assert them as a counterclaim in the New York action, but prosecuted a cross-action upon them in Illinois.

It is true that at the time both actions were begun the Davis Company was solvent, and there was no special reason for asserting a set-off, but two years later, and while both actions were pending, the Davis Company became insolvent, and receivers were ap-

pointed in both states. The New York action was then pending on trial, and there was still time for complainant to have asserted a set-off had it so desired but it did not.

(*b*) It was guilty of laches in the prosecution of the Illinois action. That action was begun in November, 1893. It was at issue December 8, 1893 (p. 42). The condition of the court calendar in Chicago involved a delay of not more than two years between the bringing of an action and an opportunity to try it. The attorneys for the present complainant requested delay. They made default, and allowed the action to be dismissed. In short, no diligence whatever was shown, and while judgment might have been obtained in Illinois in December, 1895, it was delayed until January, 1899 (p. 42). The complainant allowed its Illinois action to slumber for over three years. During this time Weed was active in prosecuting his suit to judgment and in defending it on appeal. In so doing he necessarily incurred expense which he might not have done had he known that the dormant Illinois action could be used to deprive him of the fruits of his diligence. Had complainant obtained judgment in December, 1893, and then asserted a right to set-off, it would have presented a stronger equity. As it is, the defendants may well invoke the rule:

> " The party proposing to make the set-off must
> " use diligence and not delay until the interests of
> " third persons have intervened."
>
> Waterman on Set-off, sec. 373.

It is, of course, true that the title of defendant to this judgment was acquired before the time when, by ordinary diligence, complainant might have got judgment in its Illinois action; but defendants may well say that by incurring the expense of defending their own judgment on appeal, *after the time when complainant*

might have procured its judgment, they have acquired a new and intervening equity which is entitled to protection.

EIGHTH.

A several judgment cannot be used as a set-off against a joint judgment.

The judgment which complainant seeks to extinguish by set-off is a joint judgment against the complainant and Fowler Brothers, Limited. The judgment which it seeks to use as a set-off is a several judgment in favor of the Anglo-American alone. This is not allowed even in equity.

Story's Equity, sec. 1437.
Waterman on Set-off (2d ed.), sec. 416.
Dale *vs.* Cooke, 4 John Ch., 11.
Greene *vs.* Darling, 5 Mason, 201.
Howe *vs.* Sheppard, 2 Sumner, 409.
Gray *vs.* Rollo, 18 Wall, 629.

Waterman on Set-off states the rule briefly:

> "Sec. 416. Nor will courts of equity any more "than courts of law in general allow the set-off of "a joint debt against a separate debt or con- "versely of a separate debt against a joint debt."

It is true that when the set-off sought is strictly of judgments, the rule that the parties must be the same in each, is sometimes departed from. But this departure is peculiar to setting off judgments, and the right to vary from the general rule does not arise until the judgments are actually entered on each side.

Graves *vs.* Woodbury, 4 Hill, 559–561.

In the present case, as we have already shown, the judgments are not and never have been mutual, *i. e.*, for and against the same parties, and, considering the bill as one filed for a set-off of judgments, such set-off must be denied, as the property of the defendant,

Weed, cannot be taken to pay the debt of the Davis Company. It is only by going back of the judgments that any color can be found for the attempted set-off, and the debts which existed before the judgment, were the one joint and the other several. The complainant therefore cannot escape the operation of the general rule by invoking a doctrine peculiar to judgments, unless it concedes that its bill is framed to procure the set-off of judgments, and in that case it cannot succeed, as the judgments were never mutual.

NINTH.

There is no claim now existing in favor of the Anglo-American Company which is a valid set-off against the judgment held by defendant Weed.

It is a settled rule that no claim is available as a set-off unless it is one on which an action might be brought by the party claiming it at the time when and the place where he makes his claim.

Waterman on Set-off, sec. 66.
Cragin *vs.* Lovell, 88 N. Y., 258.
Dieffenbach *vs.* Roch, 112 N. Y., 621.

1. *The Illinois judgment is not such a claim.*

(*a*) The complainant so asserts in its bill of complaint (p. 3).

(*b*) It does not purport to run against defendants, Weed and the bank, and so it is not a cause of action against them.

(*c*) It did not exist at the time the cause of action was assigned to Weed, which has resulted in the judgment sought to be extinguished by set-off.

2. *The demand on which the Illinois judgment was recovered is not such a claim.*

(*a*) The bill of complaint does not proceed on any such theory, and relief can be granted only according to the allegations.

(*b*) It is merged in the judgment.

(*c*) If the judgment be disregarded it is barred by the statute of limitations. An outlawed claim cannot be used as a set-off (Waterman on Set-off, sec. 99). The judgment is not a new promise under section 395 of the Code. It may be treated as a new cause of action, but it cannot be used to defeat the bar of the statute as against the expired claim and then disregarded to avoid the merger of that claim.

TENTH.

The lien of the attorneys who procured and defended the New York judgment is paramount to any claim of set-off on the part of complainant.

By section 66 of the New York Code, attorneys have a lien on the cause of action they are retained to prosecute which attaches to the judgment or the proceeds thereof "in whosoever hands they may come." This lien is not confined to taxable costs, but extends to "compensation * * * governed by agreement express "or implied."

This lien is paramount to a set-off in favor of the adverse party.

Waterman on Set-off, sec. 389.

The evidence shows that the services of the attorneys in prosecuting the defendant's action against the Anglo-American and Fowler Brothers, including the appeals, were worth $7,500, and for this amount they have a lien. This lien on the judgment extends to all services rendered on the same retainer, *i. e.*, all services in connection with the matters in controversy between

the Davis Company and the Anglo-American. It is not confined to services in the action in which the judgment was recovered.

Re Paschal, 10 Wall, 483.

ELEVENTH.

The decree of the Circuit Court is right and should be affirmed with costs.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Appellees.

Supreme Court of the United States.

No. 63—October Term, 1903.

The Anglo-American Provision Company, Appellant, *vs.* Davis Provision Company, Smith M. Weed, Frank E. Smith, et als.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[November 30, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court dismissing the plaintiff's bill. The bill is founded on the matters stated in the preceding case. It alleges that the Davis Provision Company recovered a judgment against the plaintiff, in New York, about a year and a half after the judgment recovered by the plaintiff against the Davis Provision Company in Illinois. It shows the effort of the plaintiff to recover in New York on the Illinois judgment, and the action of the New York courts which we have reviewed. It alleges that the two judgments arose out of the same transaction, and that by reason of the New York decision the plaintiff is unable to set off the judgment against that obtained in New York by the defendant. It sets up the unconstitutionality of the New York statute, alleges the insolvency of the Davis Provision Company, and prays for a set-off of judgments. A demurrer to the bill was overruled, 105 Fed. Rep. 536, but on final hearing the bill was dismissed on the ground that the judgment in favor of the Davis Provision Company had been assigned to the defendant Weed, for value, and under such circumstances that it was not subject to the set-off claimed. The plaintiff appealed to this Court.

It was admitted by the appellant, at the argument, that the plaintiff would fail on the merits if the preceding case should be decided as it has been. But we are precluded from an inquiry into the merits or even into the jurisdiction taken by the Circuit Court under Rev. Stat. §§ 1977, 1979, until the jurisdiction of this Court to entertain the appeal is established. *Mansfield, Coldwater & Lake Michigan Railway Co.* v. *Swan*, 111 U. S. 379, 382.

Under the act of March 3, 1891, c. 517, § 5, 26 Stat. 827, this must be maintained either as a case in which the jurisdiction of the Circuit Court is in issue, or as a case in which the "law of a State is claimed to be in

contravention of the Constitution of the United States." With regard to the former ground, the Circuit Court sustained the jurisdiction, and the case is disposed of by *United States* v. *Jahn*, 155 U. S. 109, 114, 115. "If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where if this question of jurisdiction arises the Circuit Court of Appeals may certify it." With regard to the latter ground, the decision of the Circuit Court again was in favor of the plaintiff, and it has nothing of which to complain. "As a general rule the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage." Cited from Mr. Justice Curtis' dissent in the *Dred Scott case*, 19 How. 393, 566, in *Mansfield, Coldwater & Lake Michigan Railway Co.* v. *Swan*, 111 U. S. 379, 382. This remark, to be sure, is not strictly in point, as the plaintiff would not ask to have the judgment reversed on the ground that this New York law was constitutional. But it, with the quotation from *United States* v. *Jahn*, helps to indicate a principle to be applied to the construction of the words "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." Those words are general in form, but they do not mean that whenever a party makes a case of that sort he may appeal directly to this Court whenever the decision is against him, no matter on what grounds, although his contention about the State law is sustained. If a party comes into the Circuit Court alleging that a State law is unconstitutional, and the Circuit Court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this Court on grounds that otherwise would not support an appeal. See *Lampasas* v. *Bell*, 180 U. S. 276. The present case illustrates the principle. The argument for the appellant is devoted not to any constitutional or jurisdictional point, but to an attempt to upset the decision of the Circuit Court upon the question, mainly of fact, as to the good faith, &c., of Weed in taking the assignment of the judgment. The provisions of § 5 of the act of 1891 were not intended to be made an instrument for such attempts.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

7175